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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

TRAN QUI THAN, PETITIONER

v.

DONALD T. REGAN,
SECRETARY OF THE TREASURY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May the Secretary of the Treasury lawfully continue to freeze assets of refugees from Vietnam for use as a bargaining tool in future negotiations between the United States and the communist government of Vietnam?

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v.

DONALD T. REGAN
SECRETARY OF THE TREASURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Tran Qui Than, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 13, 1981, which affirmed an order and judgment of the District Court for the Northern District of California granting summary judgment for the respondent.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 658 F.2d 1296, and is set forth in Appendix A, infra.

The order of the Court of Appeals denying petitioner's motion for reconsideration is not reported and is set forth in Appendix B.

The opinion of the District Court for the Northern District of California is reported at 469 F.Supp. 1202, sub nom. Tran Qui Than v. W. Michael Blumenthal, and is set forth in Appendix C.

A letter communication, comprising the administrative decision by the Foreign Assets Control Division, Department of the Treasury, denying petitioner's application for a license to unblock assets is unreported and is set forth in Appendix D.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The judgment of the Court of Appeals was entered on October 13, 1981. A timely petition for reconsideration was denied by the Court of Appeals on March 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL JURISDICTION BEFORE THE DISTRICT COURT

Federal jurisdiction was invoked under 28 U.S.C. §1346; 28 U.S.C. §1331; and 50 U.S.C. App. §9(a).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

This case primarily involves a challenge to the applications of Section 5(b)(1)(B) of the Trading With the Enemy Act (henceforth "TWEA"), 50 U.S.C. App. §5(b)(1)(B) which provides in pertinent part as follows:*

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise,

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*/The section as quoted does not reflect the changes made by amendment in 1977. Pub. L.No. 95-223 §101(a), 91 Stat. 1625. The current version of Section 5(b) restricts the President's authority to times of war. However, the restriction in the amendment to the statute was made prospective only by §101(b) and (c) of Pub.L. 95-223 and this case is governed by the statute as quoted above.

Section 5(b) is identical with 12 U.S.C §95a. It is also nearly identical with §203(a)(1) of the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §1702(a)(1). That section, however, continues the President's authority to act in time of peace, but only during a declared national emergency. 50 U.S.C. §1702(a)(1) is set out in pertinent part in Appendix E.

and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise --

* * * * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportaiton, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

* * * * *

Petitioner alleges an uncompensated taking of his property in violation of the just compensation clause of the Fifth Amendment to the United States Constitution which provides in pertinent part:

> No person shall be. . . deprived of . . . property, without due process of law; nor shall private property be taken for a public use, without just compensation.

Sections of the Foreign Assets Control Regulations, 31 C.F.R. Part 500 (1981) which implement TWEA §5(b) are also in-

volved: 31 C.F.R. §§500.201, 500.312 and 500.505. These are set out in Appendix E.

For ease of reference, petitioner also includes in Appendix E the pertinent text of the following statutes which are referred to in this Petition: 22 U.S.C. §1645h, 50 U.S.C. §1702(a)(1), 50 U.S.C. App. §9(a).

STATEMENT OF THE CASE

Petitioner is a Vietnamese refugee who lives in California.[1] He fled Vietnam five days before the communist forces of North Vietnam overwhelmed the Republic of Vietnam (South Vietnam) on April 30, 1975 and established in Saigon the Provisional Revolutionary Government ("P.R.G."). Petitioner was the President and General Director, as well as one of 11 shareholder-directors, of the Dong Phuong Bank ("the bank"), a private banking corporation established in 1968 under the laws of the Republic of Vietnam. The bank had its headquarters in Saigon and operated 22 branches in the northern provinces.[1]

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[1] Petitioner entered the United States as a refugee with "parole status" granted by the Attorney General under Section 1182(d)(5) of the Immigration and Nationality Act, 8 U.S.C. §1182(d)(5).

Pursuant to 31 C.F.R. § 500.505 petitioner is an "unblocked national".

In March and early April 1975, communist forces from North Vietnam launched a major and successful attack which resulted in the takeover of all the northern provinces in Vietnam. All of the bank's branches were confiscated. On April 15, 1975, the shareholder-directors met in Saigon to determine what action they should take with respect to the bank and its remaining assets in light of the imminent fall of Saigon. Conditions in Saigon were by then chaotic; the government of the Republic of Vietnam threatened sanctions against any corporate actions deemed to impair public morals (such as voluntary corporate dissolutions).

Fearing for their personal safety and in light of the government's threats, the shareholder-directors were unable to take formal steps to liquidate the bank. Instead, they adopted a resolution providing that those members of the Management Board

able to leave the country "will be qualified to manage and to make use of all the accounts of Dong Phuong Bank in banks located out of Vietnam as well as all properties that the Dong Phuong Bank possessees abroad." (App. A, 4, f.n. 2). This resolution was to be "enforced beginning the day when ... Saigon ... will be occupied by the Communist government." (App. A, 5-6, f.n. 3).

The bank closed its doors and ceased operations as a private bank on April 28, 1975. Between April 15 and April 28, 1975 the bank liquidated its securities portfolio and returned funds to depositors. Immediately upon the fall of Saigon, at 0203 G.M.T., May 1, 1975, the P.R.G. broadcast Communique No. 3, which decreed in relevant part:

> All public offices, public organs, barracks, industrial, agricultural and commerical establishments, banks, communication and transport [facilities] ... together with documents, files, property and technical means of

> U.S. imperialist and the Saigon administration -- will be confiscated and, from now on, managed by the revolutionary administration.

Prior to April 30, 1975, the bank had become the assignee of a claim for $221,235 owed by the United States to a contractor for services rendered to the U.S. Army in Vietnam which the United States had not paid.[2]

After arriving in the United States, petitioner requested payment of that sum on behalf of the bank, but the Army refused to pay on the ground that the monies owed had been blocked by the Secretary of the Treasury when the Foreign Assets Control Regulations were extended to South Vietnam on April 30, 1975. 31 C.F.R. §500.201(d) (Part

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[2] The bank had provided interim financing to the contractor and had, with the approval of the U.S. Army, taken back an assignment of the contract amount payable by the Army. The contractor had fully performed its contract with the Army. (App. C,5-6).

I). Thereafter, petitioner applied to the Treasury Department's office of Foreign Assets Control in his own right and on behalf of six other shareholder-directors who had also fled Vietnam[3] for a license to unblock the sum owed to the bank by the Army.

In his application, petitioner stated that the bank had to release its assignment to the Army before the Army could make payment to the contractor. All the principals in the contractor's organization were in the United States and the Army wished to close out the matter by making the payment. Further, petitioner stated that

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[3] Petitioner holds irrevocable powers of attorney from these six shareholder-directors to act on their behalf in recovering the bank's United States assets. Petitioner and these six fellow directors own 56% of the outstanding stock of the bank. During the course of litigation in this case, two more directors, holding an additional 15% share interest in the bank, fled as part of the "boat people" forced emigrations from Vietnam. This left only two remaining directors in Vietnam, whose whereabouts remain unknown.

in his view no license was necessary since the bank had been dissolved prior to April 30, 1975 both by virtue of the shareholder's resolution of April 15, 1975 and by virtue of the confiscation of the bank by the P.R.G.

In an addendum to his application, petitioner made the point that the directors outside Vietnam are acting as trustees in dissolution; these directors may act on behalf of shareholders and creditors outside of Vietnam; they would not be acting for the bank itself. The directors would therefore not in a strict sense be acting for a designated national.

The application appended an opinion of counsel which concluded that on the strength of Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); and Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), cert.

denied 393 U.S. 924 (1969), the communist government successors to the bank "would have no claim at all to whatever assets and rights the Dong Phuong Bank may have in the United States."

Acting on behalf of the Secretary, the Office of Foreign Assets Control denied the license application on February 22, 1977 without mentioning the confiscation of the bank by the P.R.G. The denial letter (App. D) stated that the bank "had an interest in the funds due under all contracts which had been assigned to it." The resolution of April 15, 1975 "did not even purport to transfer the bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the resolution effected a valid dissolution of the corporation under the laws of South Vietnam." (App. D, 3-4).

Petitioner challenged the denial of the license application in the District Court and sought declaratory relief against the Secretary. In discovery, petitioner elicited from the Secretary via interrogotaries the following policy guideline concerning the issuance of licenses by the Secretary "in cases where the owner of blocked assets is a corporation" (R. 271):

> It is the established policy of the Office of Foreign Assets Control, in general, to deny application for unblocking assets of blocked corporations owned by nationals of a blocked country, wherever they may be located, subject to 31 C.F.R. 500.201, in order to preserve the assets intact from the date of blocking for possible use in a government program for the settlement of American claims against the governments of the designated country. Applications for licenses to unblock assets of corporations organized in a designated country on the effective date for that country are denied under this policy.

The District Court on cross-motions for summary judgment held that the bank was a "designated national" under the Foreign

Assets Control Regulations; therefore, the assets in the United States were subject to blocking. The Court determined that as of April 30, 1975, the bank had an interest in the funds due from the Army.

The shareholders resolution of April 15, 1975 had been insufficient formally to dissolve the bank or to transfer its foreign assets to its shareholders. The Court noted petitioner's affidavit testimony "that in the chaotic an dangerous situation during the final days of the Republic of Viet Nam, [the shareholders'] resolution came as close to dissolving the corporation as the shareholders dared to come." Nevertheless, the resolution had been insufficient "under Vietnamese law to dissolve the bank or transfer any of its assets to the shareholders; indeed, such a dissolution or transfer would, according to plaintiff, have been illegal under Vietnamese law."

(App. C, 17)

As for the seizure of the bank by the P.R.G., the District Court held that the very fact of confiscation made the P.R.G. "the successor-in-interest to all the Bank's claims." (App. C, 20). Thus, the P.R.G. had an interest in the Army claim under 31 C.F.R. § 500.201. The territorial restriction on the Act of State doctrine was rejected because "Vietnam is not a party to this action, and the validity of the confiscation is not in issue."

Petitioner's Fifth Amendment claims were rejected on the ground that "blocking is by its nature only a temporary action;" moreover, in the Court's view, petitioner had "failed to establish that he and his fellow shareholders had any constitutionally protected property interest in the claims owned by the bank." (App. C, 28)

On appeal, the Ninth Circuit also took a formalistic approach as to the corporate

resolution and refused to apply equitible doctrines to give the shareholders the assets in the United States.[5]

The territorial limitation on the Act of State doctrine was disposed of by the Court as follows (App. A, 28):

> Neither the decision of the Secretary nor the judgment of the District Court purported to determine title to the assets at issue. Rather the Secretary's decision simply continues in effect the temporary blocking of the transfer of those assets until a resolution of American claims is made or some other political agreement is reached with the P.R.G.

Petitioner's arguments that the blocking action by the Secretary constituted an unconstitutional taking without just compensation and violated his right to

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[5] "[E]ven if the document by its terms clearly manifested an intent to dissolve the Bank or Than adduced evidence in his application to support that claim, the Resolution would have been ineffective to dissolve the Bank. By Than's own admission, corporate dissolutions were forbidden in the waning days of the South Vietnamese Government. In general, [e]ffect must be given to the law of the situs wherein the Bank was incorporated and operated." (App. A, 22, f.n. 12).

equal protection of the laws were deemed "unpersuasive." Section 5(b) of the TWEA had "received the constitutional imprimatur of the Supreme Court in Propper v. Clark," 337 U.S. 472 (1949) (App. A, 28-29) and the Court quoted from Propper a suggestion that even in time of peace the broad powers of the executive under the TWEA "must be given generous scope to accomplish its purpose. * * * To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the Nation's interest." (Id., at 481-82.)

Blocking was deemed to be only "temporary." Because "blocking does not transfer title but prohibits temporarily, transactions involving those assets," (App. A, 30) the Court distinguished it from other forms of "taking" by the Govern-

ment.[6]

The government interest which justified the application of the blocking provisions in this case derived from the possiblity that the P.R.G. would claim the Army Funds. The interest of the P.R.G. in the blocked assets would allow the United States to "use the blocked funds as a diplomatic negotiating tool" in future negotiations with the P.R.G. (App. A, 36). This bargaining chip rationale related to a "legitimate governmental interest." (App.

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[6] The very same distinction was also used by the Court to deny petitioner a right to a trial de novo in the District Court. Section 9(a) of the TWEA, 50 U.S. App. §9(a) grants a right to a trial in the District Court whenever the government has by "seizure" taken control of property. The Court determined that the mere freezing of funds did not constitute a "seizure", so that a trial de novo was not available. Petitioner had to content himself in view of the Court with an Administrative Procedure Act appeal under 5 U.S.C. § 706(2). The entire record before the Secretary, however, consisted of a one-page form application with a brief addendum; a letter from counsel to petitioner; a letter from petitioner to the office of Foreign Assets Control; and a three-page letter denial of the application.

A, 36).

Petitioner's Motion for Reconsideration, timely filed, was denied by the Court by Order dated March 1, 1982 (App. B).

REASONS FOR GRANTING THE WRIT

The question is important for two reasons

I. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL AND STATUTORY ISSUES GROWING OUT OF RECURRING EFFORTS BY ALIEN OWNERS OF PRIVATE PROPERTY IN THE UNITED STATES TO UNBLOCK ASSETS FROZEN BY THE SECRETARY UNDER §5(b) OF THE TWEA.

The Ninth Circuit justifies the Secretary's refusal to unblock assets primarily under the bargaining chip rationale.[7] How-

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[7] "[I]t is conceivable that the United States could use the blocked funds as a diplomatic negotiating tool. Such use would serve a legitimate governmental interest." (App. A, 36). The Court describes but does not rely upon a further justification: "to provide a fund from which United States citizens could be compensated for injury occasioned them by designated countries." Ibid. This is the ground primarily relied upon by the Secretary in the Answer to the Complaint, and in the government's briefs before the District Court and the Court of Appeals.

ever, this Court has never sanctioned the freezing of foreign-owned private property, in the absence of a declared war, under this rationale.[8]

There are compelling reasons why this Court should now mark definitive guidelines for controlling the blocking of alien-owned private property in time of peace. At the time of this petition, funds belonging to Vietnamese and Cambodian nationals have been frozen for seven years by the Secre-

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[8] Thirty years ago, in a trilogy of cases, this Court considered the reach and effect of freezing controls on alien-owned property in time of declared war, when the powers of the Executive are at their peak. Orvis v. Brownell, 345 U.S. 183 (1953); Zittman v. McGrath, 341 U.S. 446 (1951); and Propper v. Clark, 337 U.S. 472 (1949). The Zittman Court pointed out that the blocking of "enemy" property (i.e., time of war) serves several salutary purposes, including promoting potential foreign relations uses such as "post-war negotiations and settlements." 341 U.S. at 454. The property of friendly aliens whose country is occupied by the enemy may also be blocked, but only to protect the owners' interests and to prevent the enemy from acquiring any benefit from these blocked assets. None of these tnree cases sanctioned the blocking of the private property of friendly aliens in time of peace.

tary.[9] The Secretary has blocked funds of Cuban corporations for 20 years.[10]

When a country falls to communist forces, a rush of refugees to the United States is likely to ensue; at the same time, the Secretary freezes the private property of all nationals of the fallen country within the United States, including the property of these refugees. With revolu-

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[9] Vietnam was added to the Foreign Assets Control Regulations as a "designated foreign country" effective April 30, 1975 at 12:00 p.m. e.d.t. and Cambodia was added effective April 17, 1975. See 31 C.F.R. §500.201(d) (Part I) (1981). The Secretary has refused to unblock assets of any corporation, confiscated or not, established under the laws of any designated country.
"Although you could in theory get a license, in fact you never got it... There was never any licensing program with respect to commercial transactions involving these countries that we have condemned, the Far Eastern communist countries." Hearings, House Committee on International Relations (Subcommittee on International Economic Policy and Trade) "Trading with the Enemy Reform Legislation" (March 29, 1977); (testimony of Andreas F. Lowenfeld), pp. 4-5.

[10] In 1962, the Secretary issued the Cuban Assets Control Regulations, 31 C.F.R. Part 515, which placed Cuba on a special proscribed list. These regulations are but parallel control provisions to the Foreign Assets Control Regulations; they differ only in that they apply to Cuba specifically.

tionary forces now threatening the stability of governments in countries on several continents the potential is great for further blocking.[11]

The Secretary's blocking action is improper under appropriate consitutional and statutory standards. Refugee-shareholder litigants and lower courts urgently need this Court to clarify the applicable standards and to secure compliance with the standards by the Secretary. In this regard there are several important questions which have been unanswered or in-

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[11] The decision below should frighten aliens in unstable countries where revolutionary forces threaten to gain an upper hand. These aliens will be encouraged to withdraw funds from the United States in fear that in the event of a crisis the United States will freeze their U.S.-situated assets under the successor to §5(b) -- §203(a)(1) of the International Emergency Economi Powers Act, 50 U.S.C. §1702(a)(1). Such encouragement is obviously adverse to United States interests. For instance, a withdrawal of assets privately held in the United States by nationals of one or more OPEC nations would have a catastrophic effect on the financial institutions and balance of payments position of the United States.

adequately considered:

(A) Is the bargaining chip justification constitutionally adequate to permit the Secretary to withhold assets of confiscated foreign corporations from their refugee shareholders, when this Court has determined that the United States may not use the property of alien friends to compensate U.S. citizens for wartime losses?

In Kaufman v. Societe Internationale, 343 U.S. 156 (1952), this Court determined that a seizure under Section 5(b) of the Act "requires consideration of the plight of innocent stockholders." Section 5(b) "does not contemplate appropriation of friendly or neutral assets. While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other

stockholders."[12]

The Court below considered Kaufman inapplicable because "[t]he blocking of the assets ... does not affect the interest, right or title to them which [petitioner] may possess .... The blocking action merely suspends indefinitely the right to transfer these funds." (App. A, 16). However, this Court has never taken such a view of the consequences of the freezing of assets. The postponement of the return of property

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12 343 U.S. at 159. In Pernikoff v. Kennedy, 219 F.Supp. 854 (D.D.C. 1963), the Secretary blocked funds in a U.S. bank belonging to a German corporation established prior to World War II by a French citizen who had lived in Germany. After the war, the Secretary sought to vest title in these funds in the United States. The shareholder had died, and his two heirs, both foreign residents, brought suit under §9(a) of the Act to recover the funds. Relying upon the rationale in Zittman v. McGrath 341 U.S. 446 (1951), that a principal justification for the freezing was to preserve the assets for a return to their individual owner, the court concluded that "[s]uch 'protection' would be illusory indeed if, after the freezing program had succeeded in keeping the funds from Nazi hands, those funds are not returned to heirs of the person for whom the protection was designed in the first place." 219 F.Supp. at 860.

constitutes a deprivation just as much as the taking of the property itself.[13]

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[13] Seibert v. United States, 122 U.S. 284 (1887); Louisiana v. New Orleans, 102 U.S. 203 (1880). See also, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972). ("[A] temporary, nominal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.") Indeed, the long-term blocking of the property destroys it piecemeal through the erosion caused by inflationary pressures and high interest rates.

In 1979, the Regulations were amended in 31 C.F.R. §500.205(b) to require government agencies to deposit blocked assets into interest-bearing blocked accounts, unless the General Counsel of the agency involved has certified that the agency cannot comply with the requirement because of a statutory disability. The Army has not complied with this section and the funds represented by the claims have accordingly not been bearing interest.

Further, where, as here, the blocked asset consists of a chose-in-action, the claim may be time-barred. There is nothing in the TWEA which itself tolls petitioner's claim against the Army, and blocking by the Secretary does not of itself toll the statute of limitations. See Gazda v. United States, 108 F.Supp. 516 (Ct.Cl. 1952). Accordingly, Vietnamese having such claims must file suit against the United States before the six-year statute set out in 28 U.S.C. §2401(a) has lapsed. and petitioner has done just that before the Court of Claims in Civil No. 287-81C. That action has been stayed pending the outcome of these proceedings.

It makes little sense to block petitioner's property as a counter in future negotiations with the P.R.G., to induce payment by the P.R.G. from unrelated funds to U.S.-citizen claimants. The P.R.G. has no interest in having blocked funds released to Vietnamese who have fled Vietnam and who are hostile to the communist regime. The P.R.G. can only have an interest in having funds owned by Vietnamese nationals still in Vietnam or in funds of the old Republic of Vietnam (South Vietnam).[14]

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[14] These two categories are not here involved. Petitioner has not questioned the Government's right to freeze the property of persons who reside in the territory of the foreign country which is the target of economic sanctions imposed by the Executive. Blocking under those circumstances serves a dual purpose of protecting the interests of the owners, and at the same time denying to the designated state access to hard currency -- the pivotal issue in Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966), cert. denied 385 U.S. 898 (1966).

The bargaining chip rationale for blocking petitioner's assets is highly suspect. The freezing of funds is either a prelude to vesting and the use of such funds to pay debts owed by the P.R.G. to U.S. citizens -- i.e., taking property from friendly aliens in time of peace to pay the unrelated claims of U.S. citizens -- or it has no purpose whatsoever.

Since Kaufman has declared that the vesting of an alien's assets in the United States for payment into a claims fund from which U.S. nationals would be compensated cannot lawfully be accomplished, the long-term blocking of petitioner's assets in anticipation of such a use must also be improper.

(B) Does a communist government have sufficient interest in a private corporation's assets to justify the Secretary's withholding such property from the cor-

poration's refugee shareholders?

The decision of the court below concludes that it is "not unreasonable to assume that assets owned by an entity incorporated under the laws of South Vietnam are assets in which the P.R.G., as the successor government, has an interest." (App. A, 35.) The Ninth Circuit also states that it is not "unreasonable to acknowledge the possibility that a foreign country would assert an interest in the assets of corporations organized under its laws." (Id.)

These statements of potential "interest" by a communist government in property owned by former nationals of that country reflect a view of the relationship between the state and the property rights of its citizens which is total anathema to the Fifth Amendment. This Court has never recognized the doctrine that a foreign

state has an interest in all private property of its citizens by virtue of its potential as a sovereign to proclaim such an interest.

The Act of State doctrine has long held that the confiscatory decrees of a foreign state will not be given effect in this country, even where directed against its own nationals. Furthermore, the owners or shareholders of a confiscated foreign corporation have a right to recover the corporation's foreign assets which have escaped the reach of the confiscating state.[15] The doctrine is

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15 See, e.g., Mendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Maltina Corporation v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972), cert. denied 409 U.S. 1060 (1972); Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939), aff'd by an equally divided court sub nom. United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), cert. denied 393 U.S. 924 (1969); Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F.Supp. 892 (S.D.N.Y.

(footnote cont'd.)

based upon public policy considerations and has constitutional underpinnings.[16]

This territorial limitation on the Act of State doctrine is here rejected by the Court of Appeal. Its decision actually gives effect in the United States to the foreign confiscation. If petitioner's frozen assets are ultimately paid to U.S. claimants against the P.R.G., the latter will benefit just as if it had used its own funds to pay its U.S. creditors.[17]

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1968), mod on other grounds 433 F.2d 686 (2d Cir. 1970).

The rule has also been adopted in the Restatement (Second), Foreign Relations Law of the United States §43 (1965).

[16] Republic of Iraq v. First National City Bank, 353 F.2d 47, 52 (2d Cir. 1965), cert. denied 382 U.S. 1027 (1966); Pfizer, Inc. v. Lord, 522 F.2d 612, 619-620 (8th Cir. 1975), cert. denied 424 U.S. 950 (1976).

[17] The main U.S. creditors of the P.R.G. are, of course, large U.S. corporations to which the Republic of Vietnam had been indebted. The United States government is itself a major creditor and would presumably share in any distribution of petitioner's funds. (R., 317-318; 384).

To deprive owners of blocked property of redress because the foreign government "may declare itself to be the successor of the [corporation] via expropriation and may, at any time, seek to assert such an interest" (App. A, 26), "would effectively accomplish for the confiscating government precisely what we hold it cannot do, i.e., confiscate at will assets having a situs within this country." Zwack v. Kraus Bros. & Co., 237 F.2d 255 at 259 (2d Cir. 1956).

(C) Does the Secretary have authority to define as an "interest" adequate under §5(b) the potential assertion to ownership rights by a foreign revolutionary government in a corporation established by the pre-revolutionary government and to use such potential assertion as the basis for freezing the assets in the United States of such corporation?

Under traditional concepts of property rights, the P.R.G. has no "interest"[18] in petitioner's assets frozen by the Secretary.

The Congress gave no indication in the TWEA or in its legislative history that it intended to broaden the term beyond its traditional meaning. Nevertheless, the Secretary has created a new "interest" which has been sanctioned by the decision below: i.e.,that which a foreign government might assert in the future "in the assets of corporations organized under its laws." (App. A, 35).

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[18] Under §5(b)(1)(B), the President may "void, prevent or prohibit, any ... use, transfer, ... or exercising [of] any right, power, or privilege with respect to ... any property in which any foreign country or a national thereof has any interest." (Emphasis added). The Secretary has defined "interest" to include "an interest of any nature whatsoever, direct or indirect. 31 C.F.R. §500.312.

If the Secretary can create interests hitherto unknown to the law of property, he can block private property in the United States owned by refugee aliens for any reason. To define the power to define, without any standard, what is a proscribed "interest" amounts to free rein to freeze property without limitation.

In Real v. Simon, 510 F.2d 557 (5th Cir. 1975) the argument in favor of such free rein was rejected. The Court there would not permit the Secretary to find that a dead person has an "interest" in property held by his estate adequate to justify withholding the assets from U.S. residents. The Secretary could only block property interests known to the law.[19]

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[19] "The concept that a dead person is a 'foreign national' in possession of property within the meaning of the Trading with the Enemy Act does not have the support of logic. Under the facts presented in this case, such a determination does not have the support of the Congressional policies behind the Act. We conclude, therefore, that... the Government's determination that the deceased,

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The authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations.[20]

The Congress never intended to grant authority to block without limitation of any kind; it certainly did not intend to allow the Secretary to justify the long-term freezing of the property of friendly aliens under a rationale which can only help effectuate foreign confiscation.

II. THE DECISION BELOW RAISES SIGNIFICANT RECURRING ISSUES OF PUBLIC POLICY CONCERNING THE REQUIREMENT THAT ALIEN SHAREHOLDERS FLEEING FROM FOREIGN REVOLUTIONARY

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Urbano Real, retains an interest in his estate which justifies withholding the assets from American citizens and aresidents has no basis in law and must be set aside and annulled." (510 F.2d at 564).

Richardson v. Simm, 560 F.2d 500 (2d Cir. 1977) is contra, thus showing the confusion in this area.

20 Ruiz v. Morton, 415 U.S. 199, 232 (1974); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946).

UPHEAVALS SATISFY THE CORPORATE FORMALITIES OF THE PRE-REVOLUTION STATE OF INCORPORATION AS A CONDITION FOR RETRIEVING ASSETS IN THE UNITED STATES.

The Ninth Circuit holds petitioner to a punctilious compliance with the corporate law requirements of the fallen Republic of Vietnam in order to accomplish dissolution of the corporation. [21]

The Court below refuses to consider the consequences of an actual confiscation by the P.R.G. of the corporation's assets in

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[21] At the time the April 15, 1975 resolution was considered and adopted by the shareholders/directors, the governmental regime of the Republic of Vietnam was collapsing; institutions which marked such stability as had earlier existed in Vietnamese society were no longer functioning. Normal corporate procedures, including those prescribed by the legal codes of Vietnam regarding corporate dissolution were unavailable (R.148-149). Both the Secretary and the Court of Appeal, however, require that the precise formalities prescribed by Vietnamese law for corporate dissolution should have been followed.

Vietnam;[22] instead, it prefers the fiction that the defunct bank corporation, as an ongoing, juridical entity, continues to hold the assets in the United States. The court below rejects equitable arguments,[23] and formalistically reaches a conclusion which disables the alien owners of property frozen by the Secretary from salvaging that property.

The decision below veers sharply from the approach taken by other courts, including Federal courts of appeal and the highest court of the state of New York. Those courts have assisted shareholders

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22 The fact of confiscation was included in the record before the Secretary; it was argued extensively before the District Court without objection by the Secretary (since petitioner proceeded in his discovery and in his motion for summary judgment as if this were a §9(a) trial de novo).

23 A proceeding under §9(a) is one "in equity." A hearing to unblock assets should similarly be governed by equitable considerations.

fleeing from revolutionary regimes to recover assets in the United States which have escaped the foreign confiscator's reach:

(A) Unlike the Ninth Circuit, "in tracing ownership of United States property cast adrift by the 'extraordinary and basically unfair measure' of expropriation without compensation," the Fifth and Second Circuits "'have developed a willingness to disregard technicalities in favor of equitable considerations.'"[24]

These two Circuits regard the refugee shareholders as retaining "continuing dominion ... over property with an American situs: the former owners retain equitable title to the American property."[25]

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24 Maltina Corporation v. Cawy Bottling Company, 462 F.2d 1021 at 1028 (5th Cir. 1972), quoting from Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 293 F.Supp. 892 at 898 (S.D.N.Y. 1968), mod. on other grounds 433 F.2d 686 (2d Cir. 1970).

25 Maltina Corporation, at 1028. See, Zwack v. Kraus Bros. & Co., 93 F.Supp. 963 (S.D.N.Y. 1954), aff'd. 237 F.2d 255 (2d Cir. 1956).

"Alternatively, it might be said that the dissolution is effective in the foreign state, but the corporation retains a de facto existence in the United States beyond the territorial reach of the confiscating government."[26]

(B) Unlike the Ninth Circuit, the highest court in New York long ago rejected corporate formalism in James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (Ct.App. 1928). It refused to accept arguments that the letter of the law, as it existed under the pre-revolutionary government of Russia, should interfere with efforts by refugee shareholders to salvage corporate assets in the United States.[27]

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26 Maltina Corporation, at 1028.

27 The letter of the law, as it existed under the empire of the Czar, may have forbidden investment by a Russian corporation in the shares of any other corporation. That law had been swept away

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In Petrogradsky Mejdunarodny Kommerchesky v. National City Bank, 263 N.Y. 263,

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by the power of revolution. The decree of the Soviet Republic assumed to confiscate 'all available property' of the Rossia. If we were to recognize and enforce that destructive proclamation, the Bolshevik government rather than this plaintiff would be the gainer. When old institutions have fallen and none which we will recognize have succeeded, how shall we deal with foreign owners of property within our jurisdiction? We cast aside rigid rules made to control other conditions. * * * We view with some degree of indulgence the honest, though possibly irregular, efforts of a resident agent of foreign property and of statutory trustees controlling that property when they are far removed from the owner, when mails and cables are interrupted, when old governments and old laws are overthrown, and no new government and no new law acceptable to our institutions have been established. * * * The Rossia of Petrograd may under the Soviet decree, have ceased on April 1, 1919, to exist in Russia. Even here, its corporate life may have expired. It was half dead and half alive. We make no effort to define the authority of its directors as such. We do hold that these proscibed individuals fleeing from the fury of the revolution retained the power to conserve property in this country as far as the courts of New York can protect it.

-- 160 N.E. at 367.

170 N.E. 479 (1930), cert. denied 282 U.S. 878 (1930), Justice Cardozo, speaking for the Court found it "incredible" that the assets of a corporation should be subject to "spoilation and destruction" because of the inability of the directors of a confiscated corporation to satisfy technicalities of Russian law.[28]

The assets of a Russian bank had been seized by the Soviet government, the bank dissolved, and the directors driven into exile. When the refugee directors sought to recover the bank's deposits in this country, the New York depositary refused to turn over the assets, contending that the bank had been dissolved in Russia by the Soviet government and was no longer a jur-

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28 Testimony much more explicit and persuasive than any offered by the defendant would be necessary in order to lead us to the acceptance of a conclusion so grotesque. * * * '[A] resolution thus adopted would have the force to be attributed to the action of de facto managers, speaking and acting for the corporation in an emergency too urgent to wait upon formality.
-- 170 N.E. at 485.

istic person, and that if a juristic person, its former directors were without authority to act on its behalf.

Regardless what the Soviet government did to the bank and its assets in Rusia, in the view of the New York Court it continued as a de facto entity in the United States as long as it had assets in New York. The bank's refugee-directors were entitled to recover the assets here:

> The case comes down to this: A fund is in this State with title vested in the plaintiff at the time of the deposit. Nothing to divest that title has ever happened here or elsewhere. The directors who made the deposit in the name of the corporation or continued in that name now ask to get it back. Either it must be paid to the depositor, acting by them, or it must be kept here indefinitely. Either they must control the custody, or for the present and the indefnite future it is not controllable by any one. The defendant expresses the fear that the money may be misapplied if the custody is changed. The fear has its ba-

> sis in nothing more than mere suspicion. The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. The defendant is not required to follow the money into their hands to see how thy apply it. Its duty is t pay. -- 170 N.E. at 486.

The decision below compels Vietnamese refugees to bear the burden of satisfying the claims of U.S.-citizen creditors against the communist regime in Vietnam. Such a determination is a cruel hoax on Vietnamese refugees. Prior to April 30, 1975, the United States sided with the Vietnamese people in their effort to ward off communist aggression. The United States contracted through U.S. military organs for the supply of extensive goods and services. However, immediately upon the fall of Vietnam, the United States froze the assets of its contracting part-

ners and has refused to pay its debts, even where the owners of the contracting companies have fled Vietnam as part of the "boat people" emigrations or, as in the case of petitioner, fled Vietnam just prior to its fall to communist forces in 1975.

Since the Republic of Vietnam collapsed in 1975, more than 1.2 million people have fled Indo-China. As of March 1982, the United States has admitted 589,000 refugees from Indo-China and has resettled them in this country. Currently, 71% of Indo-Chinese immigrants are dependent upon public funds.[29] Assets frozen by the Secretary would allow their refugee owners, such as petitioner, to begin a new life in this country and in this generation.

There is no public policy set out in

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29 "No More Room For Refugees," Time, vol. 119, No. 19 (May 10, 1982), p. 17.

the TWEA that justifies the Secretary in singling out the property of defunct Vietnamese corporations to bear disproportionately the burden of promoting this Nation's foreign policy objectives with respect to the communist regime in Vietnam.[30]

In practical terms, the importance which the decision below places on the continued formal ownership by the bank corporation of assets located in the United States serves to undermine the territorial restriction on the Act of State doctrine. The Fifth and Second Circuits

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[30] "The government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our Courts." Dames & Moore v. Regan, _ U.S. _, 101 S.Ct. 2972, 2993, 69 L.Ed.2d 918, 947 (1981) (concurring opinion by Mr. Justice Powell) (footnote omitted). The just compensation proviso of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960); Agins v. City of Tiburon, 447 U.S. 255 (1980).

and the state courts of New York, discerning the folly of such an approach, choose a different path. [31]

Because the approach predetermines the result, the divergence between the decision below and those of the Second and Fifth Circuits and the Courts of the State of New York, in such a vital matter, justifies the grant of a writ of certiorari to review the judgment below.

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[31] [W]e do not lay great stress on the subtleties of the concepts of continued dominion over property located within the United States. Our decision today, our prior decision in Tabacalera [Severiano Jorge, S.A. v. Standard Cigar Co. 392 F.2d 706 (5th Cir. 1968) cert. denied 393 U.S. 924 (1968)], and those of our brother courts as well are based upon the fundamental realization that to sustain the reasoning of the district court in the present case would, in practical terms, mean the end of territorial restriction on the Act of State doctrine.

--"Maltina Corporation v. Cawy Bottling Co., 462 F.2d 1021 at 1028.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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APPENDIX A

TRAN QUI THAN,

Plaintiff-Appellant,

v.

Donald T. Regan*

Defendant-Appellee.

No. 79-4299.

United States Court of Appeals,

Ninth Circuit

Argued and Submitted

Feb. 10, 1981.

Decided Oct. 13, 1981.

*We substitute the name Donald T. Regan, the successor to the original defendant W. Michael Blumenthal, as the Secretary of the Treasury, pursuant to Fed.R.App.P. 43.

ALARCON, Circuit Judge:

Appellant Tran Qui Than (Than) appeals from a grant of summary judgment in favor of the Secretary of the Treasury (Secretary). The judgment upheld the Secretary's decision to deny Than's application for a license to unblock certain funds in the United States which had been blocked pursuant to §5(b) of the Trading with the Enemy Act (hereinafter "TWEA"), 50 U.S.C.App. §5(b), and the Foreign Assets Control Regulations (Regulations), 31 C.F.R. §§500.101 et seq. (1980). This court has jurisdiction pursuant to 28 U.S.C. §1291. We affirm in part and remand in part.

I. FACTS

The facts are not in dispute. Than is a citizen of the Republic of Vietnam and a resident alien of the United States. Prior to fleeing from Vietnam on April 25,

1975, Than was a shareholder, director, and president[1] of the Dong Phuong Bank, a private corporation established in 1968 under the laws of the Republic of Vietnam.

As of April 30, 1975, the date on which South Vietnam fell to the communist forces, the Bank was owned by twenty shareholders, all of whom were nationals and residents of Vietnam. The Bank's ten directors owned more than 80 percent of the outstanding shares; Than was the principle shareholder, owning a fraction less than 13 percent of the shares outstanding.

The shareholder-directors met on April 15, 1975, to consider the consequences to the Bank which might follow the defeat of the South Vietnamese forces. At this meeting they unanimously adopted a resolution which provided that effective upon the day

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[1] There are conflicting statements in the record with respect to whether Than was president or general director of the Bank.

of the occupation of Saigon by the enemy forces, those members of the management board "who will be able to leave the country will be qualified to manage and to make use of all ... properties that the [Bank] possesses abroad." The resolution further provided that those board members who remained in Vietnam after the communist takeover would be empowered to "manage and to make use of the properties of the Dong Phuong Bank located in [Vietnam].[2]

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[2] The Vietnamese text and an English translation of the Resolution was provided to the Secretary in Than's license application. It provides in part:

> Management of the assets in foreign countries of the Dong Phuong Bank.
>
> * * * * * *
>
> 1. Considered is the present state of urgency and the belief that the metropolis of Saigon may be taken over by the Communist government in the near future thus making impossible all banking operation with other banks in America, in Europe, and in Japan.

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On May 1, 1975, The Provisional Revolutionary Government of Vietnam ("P.R.G.") issued a communique which directed that banks would be confiscated and thereafter "managed by the revolutionary administration."[3] On this date the Bank was the assignee of monies owed to certain local

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> 2. Accordingly, the Managment Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as the properties that the Dong Phuong Bank possesses abroad.
>
> 3. At the same time, the Management Board empowers those among the Management Board members who will remain in Vietnam to manage and to make use of the properties of the Dong Phuong Bank located in the country.
>
> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

* * * * * *

[3] The parties dispute the date on which the Bank was actually confiscated. Than maintains that confiscation occurred on April 30, 1975, upon the

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Vietnamese contractors under several contracts with the United States Army and Navy.[4]

After arriving in the United States, Than, on behalf of the Bank, sought payment from the United States Army on the executory contracts in the amount of $221,235. The Army did not dispute the validity or the amount of the claim. It refused to make the payment, however, on the ground that the funds were blocked pursuant to §5(b) of the Trading with the Enemy Act,[5] and the For-

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arrival of the communist forces into the Saigon City limits. The government maintains that the Bank continued to function until August, 1975. It is undisputed, however, that the Bank, in whatever form it presently exists, is now controlled by the P.R.G.

[4] The executory contracts had been fully performed by the Vietnamese contractors by April 30, 1975, but a residual sum was still owed on those contracts by the Army and Navy.

[5] Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C.App. §5(b),
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eign Assets Control Regulations,[6] which had

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provides in pertinent part:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise-
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> * * * * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
>
> * * * * * *

Section 5(b) was amended in 1977 to restrict the President's authority only to times of war. Act of Dec. 28, 1977, Pub.L. No. 95-223, §101(a), 91 Stat. 1625. This restriction was made prospective, however, Id at §101(b). The President's authority under §5(b) was delegated to the Secretary of the Treasury. 7 Fed.Reg. 1409 (1942). The Secretary redelegated that authority to the Director, Office of Foreign Assets Control. 32 Fed.Reg. 3472 (1967).

6 Section 500.201 of the Foreign Assets Control Regulations, 31 C.F.R. §500.201 (1980), provides

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been promulgated pursuant to TWEA. The

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in pertinent part:

> (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect: (1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;
>
> (2) All transactions in foreign exchange by any person within the United States; and
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> * * * * * *
>
> (b) All of the following transactions are prohibited, except as specifically authorized by the Sec-

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Army notified Than that he would have to

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retary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, ruling, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect: (1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States;

* * * * * *

(d) The term "designated foreign country" means a foreign country in the following schedule and the terms "effective date" and "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area:

* * * * * *

3. North Viet-Nam, i.e., Viet-Nam north of the 17th parallel of north latitude: May 5, 1964.

4. South Vietnam, i.e., Vietn-Nam south of the 17th parallel of north latitude: April 30, 1975 at 12:00 p.m. e.d.t.

* * * * * *

obtain a license from the Secretary of the Treasury to unblock those funds in order to receive the contract payment.

In an attempt to acquire the Navy contract payments, Than signed a release to the original Vietnamese contractor of the Bank's claim as assignee of those payments. The Navy paid $49,965 to that contractor. The contractor paid $29,975.44 to Than, which represented the Bank's share of the proceeds. Than in turn remitted that amount to the other shareholders of the Bank who had fled Vietnam, except for his share, which amounted to $5798. The Navy made no mention of a need either for the contractor or Than to obtain any license from the Secretary in order to receive that payment.

On December 22, 1976, Than applied to the Treasury Department's Office of Foreign Assets Control for a license to unblock the Army funds. The application was denied on February 22, 1977. The Secretary deter-

mined that the April 15, 1975, Resolution was ineffective to dissolve the corporation or transfer its assets to the shareholders. He concluded, therefore, that (1) the corporation was a "designated national" within the meaning of §500.302 of the Regulations because it had an interest in the blocked assets after 12:00 p.m. E.D.T. on April 30, 1975, the date on which Vietnam was added to the schedule of designated foreign countries; and (2) as a "designated national," all transactions involving assets in the United States in which it had an interest were blocked. The Secretary also advised Than that the Navy funds which had already been paid would have to be traced and placed into blocked accounts.

Section 500.305 of the Regulations defines a "designated national" to include individuals and corporations who are "nationals" of a designated foreign country. Under §500.302 the term "national" includes

a citizen of a designated foreign country and a corporation organized under the laws of the designated country "or which on or since ... [the] effective date was or has been controlled by ... directly or indirectly, a [designated] foreign country and/or one or more nationals thereof ..."

Than challenged the Secretary's decision in the instant suit filed on June 23, 1977.[7] Than claimed that the Regulations were inapplicable to his application because there was no designated national having an interest in the funds. He alternatively claimed that if there was a designated national with such an interest the Secretary abused his discretion by failing to issue a license unblocking the funds. Than further alleged that the Secretary's

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[7] The district court found that Than was authorized to bring the action on behalf of himself and the other shareholders by the shareholder-directors known to have successfully fled Vietnam. The issue of Than's capacity too sue is not before us on appeal.

refusal to issue a license was (1) contrary to the Fifth Amendment's prohibition against the taking of property without just compensation; (2) impermissibly discriminated against aliens in violation of the Fourteenth Amendment; and (3) violated his rights under the 1961 Treaty of Amity and Economic Relations between the United States and the Republic of Vietnam.[8]

The district court entertained cross-motions for summary judgment and entered judgment for the Secretary. The court upheld the Secretary's decision not to issue an unblocking license, finding that the Bank was a designated national under the Regulations and that the Secretary's determination that the Bank was not dissolved by the April 15 Resolution was not "arbitrary, capricious, an abuse of discretion, or contrary to law." The court further

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[8] 12 U.S.T. 1703 (1961).

found no constitutionally impermissible taking nor any violation of equal protection and concluded that the Treaty relied upon by Than terminated upon the fall of the Republic of Vietnam and, thus, could not support his claim.

II. STANDARD OF REVIEW

The district court reviewed the action of the Secretary, acting through the office of the Foreign Assets Control, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§701 et seq. Than contends that this was in error. He asserts that the Secretary's decision should have been reviewed under §9(a) of the TWEA, 50 U.S.C.App. §9(a). Than's assertion is incorrect.

Section 9(a) of the Act authorizes "[a]ny person not an enemy or ally of enemy[9] claiming any interest, right, or title in

[9] The terms "enemy" and "ally of enemy" are specifically defined in §2 of the TWEA 50 (cont'd. next page)

any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the [United States Government] or seized by [it]" to seek return of the property through an adminstrative proceeding or through a suit in federal district court.

Judicial review of the Secretary's denial of an unblocking license does not lie under §9(a) because that section provides a means "through which eligible persons may seek recovery of property seized under the [TWEA]. Cornet Stores v. Morton, 632 F.2d 96, 98 (9th Cir. 1980) (emphasis added). Than cites no evidence in the record that the Army payments have been "conveyed, transferred, assigned, delivered or paid) or otherwise seized by the United States government. The blocking of

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U.S.C.App. §2. It is conceded that Than is not an "enemy" or "ally of an enemy" as defined in that section.

the assets represented by the Army contract payment does not affect the interest, right or title to them which Than may possess. See Nielsen v. Secretary of the Treasury, 424 F.2d 833, 844 (D.C.Cir. 1970). The blocking action merely suspends indefinitely the right to transfer those funds.

Than contends that if §9(a) is not construed to provide the jurisdictional predicate for judicial review of the Secretary's decision, he will be left without a remedy because §7(c) of the TWEA[10] precludes such review under the Administrative Procedure Act. This contention is without merit. Section 7(c) limits the relief or

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[10] Section 7(c) of the TWEA, 50 U.S.C.App. Section 7(c) provides in pertinent part:

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the [Government] or required so to be, or seized by [it] shall be that provided by the terms of this Act ...

remedy of any person having any claim to property which has been conveyed, transferred, assigned, delivered or paid to the government to that provided in the TWEA. As discussed above, however, there is no evidence that the assets at issue were ever conveyed to or seized by the federal government. Section 7(c), therefore, is inapplicable to this case and does not preclude judicial review of the Secretary's decision to deny an application for an unblocking license.

Section 10 of the APA, 5 U.S.C §701(a), provides that "each authority of the Government of the United States" is subject to judicial review "except to the extent that -- (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." This section creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would

be inappropriate. Dunlop v. Bachowski, 421 U.S. 560, 567, 95 S.Ct. 11851, 1857, 44 L.Ed.2d 377 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-1511, 18 L.Ed.2d 681 (1967); State of Washington v. Environmental Protection Agency, 573 F.2d 583, 587-88 (9th Cir. 1978).

Judicial review of the Secretary's decision to deny Than's application for an unblocking license is not precluded by either exception of section 701(a). We find nothing in the legislative history of the TWEA which prohibits such review either expressly or by implication. There simply has been no "showing of 'clear and convincing evidence' of a ... legislative intent ... [to] restrict access to judicial review." Abbott Laboratories v. Gardner, supra, 387 U.S. at 141, 87 S.Ct. at 1511. We

conclude, therefore, that the district court was correct in reviewing the Secretary's decision under the Administrative Procedure Act.[11]

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[11] Appellant's contention that the district court was incorrect in reviewing the Secretary's decision under §706 is erroneous. That section provides in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret consitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> * * * * * *

III. DESIGNATED NATIONAL

In the February 22, 1977, letter denying Than's application for an unblocking llicense, the Secretary stated:

> The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Ofice.
>
> The actions of the shareholders and the directors of the Bank described in the Application were ineffective to dissolve it or transfer its assets. The Resolution signed by the directors of the bank ten days prior to the fall of Viet-Nam stated that its intent was to allocate management and control of the United States assets of the Bank to the shareholders who left Saigon prior to its fall. The Resolution did not even purport to transfer the bank's interest in the United States assets to those shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Vietnam. Accordingly, there was neither a dissolution nor a

transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Vietnam.

Than contends that the Secretary abused his discretion in refusing to grant him a license for several reasons. First, he maintains that there is no designated national with an interest in the assets at issue because the Bank ceased to exist prior to the effective date and was not, therefore, a corporation with an interest in the funds which would be subject to the blocking provisions of the Regulations. He argues that the April 15, 1975, shareholder-director Resolution dissolved the corporation prior to April 30 and transferred its United States based assets to those shareholders who fled Vietnam. Than argues that the Secretary erred in failing to give effect to this Resolution. We cannot say that the Secretary's interpretation of the

Resolution based on the facts before him[12] was arbitrary, capricious, an abuse of discretion, or contrary to law. The meaning of the Resolution is at best ambiguous and the document does not, by its terms, conclusively establish an intent to dissolve the corporation. It merely provides that the

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[12] Than contends that the Secretary should have considered the Resolution in light of the chaotic circumstances under which it was adopted. None of the information with respect to those circumstances nor the purported meaning and intent of the Resolution was furnished to the Secretary, however. We may not, therefore, consider those assertions when analyzing whether the Secretary's denial of the license application was arbitary, capricious, an abuse of discretion or otherwise not in accordance with law. Because we are limited to a review of the adminstrative record that was before the Secretary at the time of his decision, we may not consider some new record that was made in the district court subsequent to the Secretary's decision. See Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973).

Moreover, even if the document by its terms clearly manifested an intent to dissolve the Bank or Than adduced evidence in his application to support that claim, the Resolution would have been ineffective to dissolve the Bank. By Than's own admission, corporate dissolutions were forbidden in the waning days of the South Vietnamese government. In general, affect must be given to the law of the situs wherein the Bank was incorporated and operated. Nielson v. Secretary of the Treasury, 424 F.2d 833, 842 (D.C.Cir. 1970).

shareholders managing to flee Vietnam should have the authority to "manage and make use of" the Bank's overseas assets. No mention is made of any authorization for those shareholders to own those assets outright. Because a rational nexus existed between the facts presented in the application before the Secretary and his determination that the Resolution did not effect a dissolution, we may not set aside that determination. See Certified Color Manufacturers Association v. Mathews, 543 F.2d 284, 294 (D.C.Cir. 1976).

Than contended alterntively that even if the Resolution was ineffective to dissolve the Bank, the Bank was seized and destroyed upon the fall of Saigon shortly before the Regulations became effective as to South Vietnam. This issue, however, was not before the Secretary,[13] and it was not

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[13] Although Than raised the issue of confiscation in his application, he did not contend that the

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a basis for his decision to deny the license. Than may not, therefore, raise the issue for the first time before the district court or upon appeal.[14]

IV. OTHER CLAIMS

Than asserts that even if the Bank technically was a designated national, the Secretary abused his discretion in not piercing the Bank's corporate veil and as-

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Bank was confiscated prior to the effective date. Moreover, he did not proffer any evidence of the date on which the confiscation allegedly occurred. The only reference to such a date is an ambiguous statement is the application:"On or before September 1, 1975, the Communist Government of Vietnam nationalized all privately-held banks in Vietnam. Since then, the Dong Phuong Bank has not operated in Vietnam as a private bank at all ..." (emphasis added).

[14] Although the district court noted that no evidence of a "pre-effective date" seizure was presented to the Secretary, the court addressed and disposed of that issue. It was erroneous for the court to have done so. That issue was not present in the administrative record nor considered by the Secretary. The court is limited in its review of agency action to the administrative record already in existence. It is not permitted to review some

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cribing its interest in the Army contract payments to the Bank's shareholders.[15] In our view, however, the Secretary's decision to treat the Bank as a corporate entity with an interest in the assets at issue is based upon the reasonable premise that the Vietnamese government has an interest in Vietnamese corporations. See Nielson v. Secretary of the Treasury, supra, 424 F.2d at 842. The reasonableness of this assumption

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new record made initially in the reviewing court. See Camp v. Pitts, supra, 411 U.S. at 142, 94 S.Ct. at 1244. The court's action does not constitute reversible error, however, because the court also upheld the Secretary on the basis of the Secretary's decision that the Bank was a designated national within the meaning of the Regulations.

[15] Than relies on Kaufman v. Societe Internationale, 343 U.S. 156, 72 S.Ct. 611, 96 L.Ed 853 (1952), for the proposition that the Secretary should pierce the Bank's corporate veil and give effect to Than's claim. Such reliance is misdirected. Kaufman involved a challenge to the vesting of assets under §9(a) of the TWEA. Furthermore, that decision was based on an interpretation of a particular federal statute regarding the distribution of German an Japanese assets vested after the war. As noted earlier, however, the instant case does not involve the vesting of the Bank's assets under §9(a).

is underscored by the possibility that the P.R.G. may declare itself to be the successor of the Bank via expropriation and may, at any time, seek to assert such an interest.

Than asserts that the P.R.G. has no interest in the Bank's American-based assets by virtue of its alleged expropriation of the Bank. He argues that any claim to an interest in those funds by the P.R.G. derives from a confiscatory taking of the Bank in South Vietnam which would not be given legal effect by our courts because of the territorial limitation on the act of state doctrine. Since the P.R.G. could not have acquired a recognized interest in the funds, Than argues, no legal basis exists for blocking these assets. This argument is incorrect.

The judicially created act of state doctrine provides that the courts of this country "will not examine the validity of a

taking of property within its own territory by a foreign sovereign government ... even if the complaint alleges that the taking violates customary international law." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964). The territorial limitation on the doctrine provides that this forbearance does not extend to property in the United States which a foreign government attempts to take without compensation. "[O]ur courts will not give 'extra-territorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals." Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1025 (5th Cir.), cert. denied, 409 &.S. 1060, 93 S.Ct. 555, 34 L.Ed.2d 512 (1972), quoting F. Palicio y Compania v. Brush, 256 F.Supp. 481, 488 (S.D.N.Y. 1966); see Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 687, 96 S.Ct. 1854, 1857, 48 L.Ed.2d 301 (1976).

The decision of the Secretary did not propose to nor in fact give an extra-territorial effect to any alleged expropriation by the P.R.G. of the Bank's assets in the United States. Neither the decision of the Secretary nor the judgment of the district court purported to determine title to the assets at issue. Rather, the Secretary's decision simply continues in effect the temporary blocking of the transfer of those assets until a resolution of American claims is made or some other political agreement is reached with the P.R.G.

Than's arguments that the blocking of the Bank's United States assets constitutes an unconstitutional taking without just compensation and violates his right to equal protection of the laws are unpersuasive. The Trading with the Enemy Act and the Regulations promulgated pursuant thereto with respect to "blocking received the constitutional imprimatur of the Supreme

Court in Propper v. Clark, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). In Propper the Court upheld the President's "freezing" order issued pursuant to §5(b) of the TWEA which prohibited certain transactions involving Austrian property except as they were specifically licensed by the Secretary of the Treasury. In upholding the TWEA and the Executive Order, the Court stated:

> The power in peace and in war must be given generous scope to accomplish its purpose. Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the us of assets that happened to be in this country. To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the nation's interest. That fact, however, cannot lead us to narrow the broad coverage of the Executive Order.

Id. at 481-82, 69 S.Ct. at 1339.

We recognize that blocking involves a deprivation of the enjoyment of a property

interest. That deprivation is temporary, however, and is not equivalent to vesting. Vesting occurs when title to assets is transferred to the government; blocking does not transfer title but rather prohibits temporarily, transactions involving those assets. We also recognize that an action intended by the government to be a temporary block on any transactions involving those assets may amount to an interminable denial of property to the individual who must await the often slow and labyrinthian course of international relations. The possibility remains, however, that the President and the Congress may decide that resumption of diplomatic and economic intercourse with the South Vietnamese government would be in our national interest.

Such a development of course might obviate the need to classify South Vietnam as a designated foreign country and to block

transactions involving assets associated with that nation. See Nielsen v. Secretary of the Treasury, supra, 424 F.2d at 843-845.

We conclude that the blocking program with respect to the assets at issue does not constitute a constitutionally cognizable taking without just compensation.

We also find unpersuasive Than's contention that the Secretary's refusal to issue an unblocking license denies him equal protection as guaranteed by the Fifth Amendment.[16] Than speculates that the rationale for denying his application was that some of the other shareholders of the Bank resided outside of the United States. He also contends that he was denied his

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[16] The Fifth Amendment's due process clause "encompasses equal protection principles." Mathews v. DeCastro, 429 U.S. 181, 182 n. 1, 97 S.Ct. 431, 432, 50 L.Ed.2d 389 (1976); Weinberger v. Salfi, 422 U.S. 749, 768-770, 95 S.Ct. 2457, 2468-2469, 45 L.Ed.2d 522 (1975).

right to equal protection because the Secretary has a policy of granting licenses to Vietnamese sole proprietors and members of partnerships resident outside Vietnam but not to Vietnamese shareholders of defunct corporations resident outside Vietnam. Both contentions are without merit.

With respect to Than's first contention, the Secretary did not deny an unblocking license on the basis of the residence of any of the other shareholders outside of Vietnam. The license was denied because the Secretary determined that the Dong Phuong Bank is a designated national within the meaning of the Regulations and because he determined that the corporation had not been dissolved prior to the effective date of blocking.

Nor do we find a violation of equal protection with respect to Than's second contention. Even assuming arguendo that the Secretary distinguishes between the

applications of sole prorietors and partnerships and those of corporate shareholders, we do not find a violation of Than's constitutional rights. "[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." (Footnotes omitted). Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976)(per curiam).

The alleged classification between a sole proprietorship or partnership and a corporation does not impact upon a fundamental right or a suspect class. It is not, therefore, subject to strict judicial scrutiny. Traditional equal protection analysis provides, however, that a legislative classification which admittedly does not concern a fundamental right or a

suspect class may be unconstitutional if the classification is not rationally related to a legitimate governmental interest. See United State Department of Agriculture v. Moreno, 413 U.S. 528, 533, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973); McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The governmental interests which arguably justify the blocking provisions of the TWEA and the Regulations are threefold: (1) to prevent designated countries from acquiring dollars: (2) to provide a fund from which United States citizens could be compensated for injury occasioned them by designted countries; (3) and to use the blocked funds as a negotiating tool with the designated country.[17] Any classification by the Secretary which discriminates

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[17] These purposes were articulated in S. Somerfield, Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba, 79 Bus.Law, 861, 862 (cont'd. next page)

against Than as a corporate shareholder, therefore, must be related to at least one of the above three enumerated interests.

It is not unreasonable to assume that assets owned by an entity incorporated under the laws of South Vietnam are assets in which the P.R.G., as the successor government, has an interest. See Nielsen v. Secretary of the Treasury, supra, 424 F.2d at 842. Nor is it unreasonable to acknowledge the possibility that a foreign country would assert an interest in the assets of corporations organized under its laws. There is no comparable legal basis, however, for the P.R.G. to assert an interest in the United States based assets of a sole proprietorship or partnership owned by an

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(1964). See also Richardson v. Simon, 560 F.2d 500, 505 (2d Cir. 1977); Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975). Although Richardson and Real articulated the purposes behind the Cuban Assets Control Regulations, the government admits in its brief that the purposes behind those Regulations and the Foreign Assets Control Regulations are virtually identical.

American resident alien who had once been a South Vietnamese citizen.

Because the P.R.G. is in a position to assert an interest in the Bank's assets held in this country, it is conceivable that the United States could use the blocked funds as a diplomatic negotiating tool.[18] Such use would serve a legitimate governmental interest. We conclude, therefore, that the Secretary's differing classification between sole proprietorships or partnerships and corporations is rationally related to a legitimate governmental interest. Accordingly, we find no violation of Than's consitutional right to equal protection.

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[18] It is not insignificant that blocked assets were used as an instrument in the successful negotiations leading to this nation's establishment of diplomatic relations with the People's Republic of China in 1979 and in the resolution of the American hostage crisis in Iran this year.

V. THE NAVY PAYMENT

Than also sought declaratory relief that $29,975.44 which he received indirectly from the Navy through a Vietnamese contractor should not be placed into a blocked account. As noted above, in denying Than's application for an unblocking license, the Secretary stated that the Navy payments must be traced and placed into blocked accounts. The Secretary did not file a counterclaim to Than's suit seeking relief with respect to the Navy funds and Than has not applied for a license with respect to those funds.

In granting the government's motion for summary judgment the district court concluded that "the actions of the Secretary in blocking the United States based assets of the Bank and declining to issue an unblocking license were within his authority." Tran Qui Than v. Blumenthal, 469 F.Supp. 1202, 1212 (N.D.Cal.1979). Argua-

bly, the judgment for the government means that the Navy funds must be placed into blocked accounts. The district court decision, however, is ambiguous on this point. We therefore, remand the case to the district court for a determination of whether the Navy funds must be placed into a blocked account.

We note that on remand the district court must determine not only whether the funds should be blocked, but if so, what amount of the payment, if any, is subject to blocking. Only a portion of the Navy payment was ultimately kept by Than. There are, therefore, equitable considerations as to whether Than should be responsible for tracing any or all of those funds. Moreover, because these funds were paid to the Vietnamese contractor by the Navy without any notification whatsoever that the funds were subject to being blocked, and because the payment was made several years

ago, there may be a question of whether the government attempt to now block those funds is barred by laches.

The judgment of the district court is AFFIRMED in part and REMANDED in part for consideration consistent with this opinion.

APPENDIX B

TRAN QUI THAN,

Plaintiff-Appellant,

v.

Donald T. Regan

Defendant-Appellee.

No. 79-4299.

United States Court of Appeals,

Ninth Circuit

Order

March 1, 1982

Appellant's motion for reconsideration of decision dated October 13, 1981 affirming in part decision of federal district court for the Northern District of California is denied.

APPENDIX C

TRAN QUI THAN, Plaintiff,

v.

W. Michael BLUMENTHAL, Defendant.

No. C-77-1361-WWS.

United States District Court

N. D. California,

April 27, 1979

MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

William W. Schwarzer, District Judge

Section 500.201 of the Foreign Assets Control Regulations ("Regulations"), 31 C.F.R. Part 500, prohibits, except upon specific authorization by the Secretary of the Treasury, transactions involving United States based property in which a designated foreign country or a national thereof has an interest. South Vietnam is

a designated foreign country. Plaintiff, a shareholder in a South Vietnam bank, the Dong Phuong Bank ("Bank"), claims an interest in funds owed by the United States Government to the Bank. The Secretary of the Treasury has ruled that the Bank is a "designated national" and that the funds are therefore blocked pursuant to the Regulations, and has refused to issue an unblocking license. The parties' cross-motions for summary judgment raise two issues. First, did the Secretary err in determining that the Bank is a designated national and therefore subject to the Regulations' blocking provisions? Second, did the Secretary err in not issuing a license unblocking the funds owed to the Bank?

I. Statement of Facts

The Dong Phuong Bank was a private commercial bank established in 1968 under the laws of the Republic of Vietnam. As of

April 30, 1975, when South Vietnam fell to the communist forces, a small group of shareholders owned the Bank's stock. All the shareholders were nationals and residents of Vietnam. The Bank's 11 directors owned more than 80 percent of the outstanding shares. Plaintiff was the principal shareholder, owning 13 percent of the outstanding shares, and served as a director and as president of the Bank.

Plaintiff fled Vietnam on April 25, 1975, and currently resides in Berkeley, California. He entered the United States as a refugee with parole status granted by the Attorney General under Section 1182-(d)(5) U.S.C. § 1182(d)(5). Of the eleven shareholder-directors, seven left Vietnam in anticipation of the communist takeover, one remained in Vietnam, one was captured and imprisoned while attempting to leave Vietnam, and the fate of the remaining two shareholder-directors is unknown. The

three shareholder-directors known to be residing in the United States (plaintiff and two others) account for 18 percent of the Bank's stock; those in France and Hong Kong hold 38 percent; those known to be in Vietnam hold 30 percent; and those whose location is unknown hold 14 percent.

On April 15, 1975, the shareholder-directors met to consider what action they should take in light of the impending fall of Vietnam. They adopted a resolution providing that those members of the management board "who will be able to leave the country will be qualified to manage and to make use of all the . . . properties that the [Bank] possesses abroad." This resolution was to be "enforced beginning the day when . . . Saigon . . . will be occupied by the Communist government."

Saigon fell and resistance ended on April 30, 1975. On May 1, the Provisional Revolutionary Government of Vietnam

("P.R.G.") issued a communique directing that "banks . . . will be confiscated and from now on, managed by the revolutionary administration." Plaintiff maintains that the Bank was confiscated and destroyed on April 30, and that the communique confirmed this fact. Defendant argues that the Bank continued to function until August 1975. It is undisputed, however, that the Bank, in whatever form it may currently exist, and its assets are now controlled by the P.R.G.

As of April 30, 1975, the Bank was the assignee of monies owed to certain Vietnamese contractors under several construction, maintenance, and supply contracts with the United States Army and Navy. The assignments were made in consideration of the issuance of performance bonds, running to the benefit of the United States, guaranteeing performance by the Vietnamese contractors, and in consideration of the

loan of working capital to the Vietnamese contractors. The contractors had entirely performed their contracts before the fall of Vietnam; however, on that date, the United States still owed a residual sum to each contractor. The contractors have since come to the United States as parolee-refugees.

At an unspecified time after arriving in the United States, plaintiff sought payment from the Army of the $221,235 which it owed under the contract. The Army refused to make this payment, stating that the money was blocked pursuant to Section 500.201 of the Regulations, and that to receive the funds it was necessary to obtain a license from the Secretary of the Treasury. At another unspecified time, plaintiff signed a release on behalf of the Bank of the Bank's claims as assignee of the sum due from the Navy. The Navy then paid $49,965 to Tran Ngoc Tuan, one of the Viet-

namese contractors now residing in the United States, which represented the total amount due under the contracts with the Navy. He in turn paid $29,975.44 to plaintiff.

On December 22, 1976, plaintiff applied to the Treasury Department's Office of Foreign Assets Control for a license to unblock the sum owed to the Bank by the Army. On February 22, 1977, the Office of Foreign Assets Control, acting on behalf of the Secretary of the Treasury, denied plaintiff's application, giving the following reasons:

> The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The letter of denial also stated that the sums already paid by the Navy were blocked under Section 500.201 and contained subpoenas requesting information about these payments.

Plaintiff filed the instant action on June 23, 1977. As amended, the complaint seeks a declaration that the Foreign Assets Control Regulations are inapplicable in this case, there being no "designated national" having an interest in the funds, and that the funds due from the Navy and the Army thus may not properly be blocked. Alternatively, if the Court finds that there is a designated national with an interest in the funds, the complaint seeks declaratory relief requiring defendant to issue a license unblocking the funds. Plaintiff has been authorized by the shareholder-directors known to have left Vietnam to assert their interests as well in this action.

II. Capacity to Sue

Defendant has challenged plaintiff's capacity to sue on the ground that Tran is not the real party in interest. Fed.R.-Civ.P. 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." But Rule 17(a) also states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Plaintiff has brought this action, on behalf of himself and other shareholders, as a shareholder of a Vietnam bank, the present legal status of which is unsettled. Plaintiff asserts that as a result of certain events, he now has an interest in funds owed to the Bank by the United States Government. Plaintiff's claims thus make him

a real party in interest. Moreover, neither ratification by the Bank nor its substitution or joinder as plaintiff is feasible. Defendant will suffer no prejudice for there is no reason why he cannot assert against plaintiff any defenses which he could have asserted against the Bank; plaintiff can claim a share only of assets to which the Bank had a rightful claim. Defendant's motion to dismiss for lack of capacity must therefore be denied.

III. Scope of Review

Judicial review of the action of the Secretary of the Treasury, acting through the Office of Foreign Assets Control, is authorized by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. Section 706 defines the scope of review in this Court:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional

and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

These standards apply except when an adjudicatory hearing is required, in which case the administrative record is reviewed under a "substantial evidence" standard. (§706(2)(E)). In the present case, no act or regulation requires an adjudicatory hearing. Section 500.801(b)(3) of the Regulations states that an applicant for a special license may arrange to make an "oral presentation" or elect to "argue the application." Plaintiff did not request an oral presentation or argue the application. Review of the Secretary's decision is thus limited in scope by the powers of review

granted in the preceding provisions of Section 706.

IV. The Classification of the Dong Phuong Bank as a Designated National

Plaintiff argues that the Secretary of the Treasury determined incorrectly that the Bank is a designated national whose United States based funds are subject to blocking under the Foreign Assets Control Regulations.

One statute and three provisions of the Regulations form the basis for the Secretary's decision. As of February 1977, Section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), provided that during war or any period of national emergency the President may prohibit "transactions involving any property in which any foreign country or a national thereof has any interest." Section 500.201 of the

Foreign Assets Control Regulations, promulgated under the Act and applicable here, bars transactions (unless specifically authorized by a license) that "involve [U.S. based] property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." The "effective date" is the date when the country is listed as a designated foreign country. Under Section 500.302, the term "national" includes a citizen of a designated foreign country and a corporation organized under the laws of the designated country "or which on or since . . . [the] effective date was or has been controlled by . . . directly or indirectly, a [designated] foreign country and/or one or more nationals thereof." Under Section 500.305, the term "designated national" includes all individuals and

corporations previously defined as "nationals.

On their face, the Regulations apply to the Dong Phuong Bank as the Secretary has determined. South Vietnam was classified as a designated country at 12:00 p.m. Eastern Daylight Time on April 30, 1975. By virtue of having been organized under the laws of Vietnam, the Bank became a national, and, in turn, a designated national, on that date. Because the Bank held an interest as of April 30, 1975, in the funds due from the United States Government, this interest became blocked and could not be transferred without a license.

Plaintiff does not dispute that the Regulations, so interpreted, apply to block the transaction at issue here. But he argues that two events --the April 15, 1975, shareholder-directors' resolution and the pre-effective date seizure of the Bank by the P.R.G.-- render the Regulations

inapplicable.

A. April 15 Shareholder's Resolution

The April 15, 1975, resolution of the shareholder-directors provided in pertinent part:

> Accordingly, the Management Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as all the properties that the Dong Phuong Bank possesses abroad.
>
> * * * * * *
>
> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

Tran maintains that the resolution was intended to dissolve the portion of the Bank existing in Vietnam, to preserve the de facto existence of the corporation outside Vietnam, and to transfer the interest in the Bank's foreign assets to shareholder-directors who escaped from Vietnam. According to plaintiff, the Bank

could therefore not have been classified by the Secretary as a designated national.

The denial letter of February 22, 1977, rejected this claim:

> The actions of the shareholders and directors of the Bank described in the Application were ineffective to dissolve it or transfer its assets. The Resolution signed by the directors of the bank ten days prior to the fall of Vietnam stated that its intent was to allocate management and control of the United States assets of the Bank to the shareholders who left Saigon prior to its fall. The Resolution did not even purport to transfer the Bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Vietnam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Vietnam.

The Secretary's interpretation of the resolution cannot be said to be arbitrary, capricious, an abuse of discretion, or contrary to law. By its own terms, the resolution did no more than allocate management and control of the Bank's foreign assets,

contingent upon the fall of Saigon. It mentioned nothing about a dissolution of the Bank, a change in its domicile, or a transfer of its assets. Plaintiff states that in the chaotic and dangerous situation during the final days of the Republic of South Vietnam, that resolution came as close to dissolving the corporation as the shareholders dared come. Plaintiff does not contend, however, that the resolution was sufficient under Vietnamese law to dissolve the Bank or transfer any of its assets to the shareholders; indeed, such a dissolution or transfer would, according to plaintiff, have been illegal under Vietnamese law.

B. Seizure of the Bank by the P.R.G.

Plaintiff contends that the Bank was seized and destroyed as an entity upon the fall of Saigon shortly before the Regulations became effective as to South Vietnam.

It is his position that the Bank was merged into the National Bank of Vietnam immediately upon its seizure, and that it never again functioned, either as a private bank or as a government-managed corporation, independent of the National Bank of Vietnam. Because the Bank ceased to exist prior to the "effective date," plaintiff argues, it never had an "interest" in the funds, which therefore never became subject to the blocking provisions of the Regulations.

Plaintiff has submitted affidavits stating that the Bank did not function after April 30, 1975, along with the May 1 communique from the P.R.G. which ordered the confiscation of all banks. Defendant responds that the May 1 communique did not "merge" the Bank into the National Bank but merely announced that the Saigon Military Management Committee assumed direction of all banks. He agrees that the P.R.G. ordered all private banks to close their

doors to customers on April 30, 1975, according to defendant's interpretation of two communiques from the P.R.G., the P.R.G. ordered private banks (specifically including the Dong Phuong Bank) to reopen for a period of two months and settle their accounts with depositors and shareholders; after the two-month period, the banks were to close, with the National Bank of Vietnam assuming control over the country's banking services. Defendant argues that the expropriation and merger of the private banks did not occur until after this two-month period had elapsed.

Because the parties did not present this evidence to the Secretary, he did not address this issue in his letter of denial. However, the issue raised by plaintiff is not material to the resolution of this case. Under either interpretation of the evidence, the Regulations are applicable. Under the facts offered by the government

(i.e., that the Bank continued operations after the effective date, albeit under P.R.G. direction), the Bank is a designated national with an interest in the funds owed by the United States Government. The funds may therefore be blocked. Under the factual situation presented by plaintiff (i.e., that the P.R.G. destroyed the Bank and seized its assets prior to the effective date), the P.R.G. directly or indirectly became the successor-in-interest to all the Bank's claims. The Regulations prohibit transactions in property in which a designated foreign country has had an interest since the effective date.

For the purpose of this summary judgment motion, the Court will consider the facts in the light most favorable to plaintiff. Assuming, therefore, that the Bank as an entity ceased to exist before the effective date, its assets, having been taken over by the P.R.G., were clearly

subject to being blocked. Plaintiff admits that had the Bank carried on business after the effective date, the funds in dispute could properly be blocked. Nielsen v. Secretary of Treasury, 137 U.S.App.D.C. 345, 424 F.2d 833 (1970). Plaintiff attempts to distinguish the present case from Nielsen in that the bank was not a functioning corporation on the effective date. But a fund belonging to a bank expropriated by Vietnam surely qualifies as "property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. §500.201. A government with the power to exproriate also has the power to assert a claim as the successor to an expropriated bank's foreign-based assets. It is clear, therefore, that the mere fact of expropriation by Vietnam prior to the effective date does

not distinguish this case from Nielsen.

V. The Refusal to Issue a License Unblocking Funds

Plaintiff argues further that, in any event, the Secretary erred in not issuing a license unblocking the Bank's United States based assets. In plaintiff's view, the Secretary's failure to issue a license conflicts with the territorial limitation of the act of state doctrine, and plaintiff's constitutional and treaty rights.

A. Effect of the Territorial Limitation of the Act of State Doctrine

Tran argues that the territorial limitation of the act of state doctrine bars any claim to the United States based assets derived through the expropriation of the Bank. Inasmuch as no designated country or national could therefore have acquired an interest, no legal basis exists for block-

ing these assets.[1]

The classic statement of the act of state doctrine, quoted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), appears in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of

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[1] Although plaintiff has not fully articulated it, the logical extension to his argument is that application of the Regulations to the assets of a corporation expropriated before the effective date is improper for it is not within the scope of the authorizing statute, Section 5(b) of the Trading with the Enemy Act, supra. But that Act grants broad powers to the President. Regulations issued pursuant to the Act are valid if they carry out a purpose of the authorizing statute. See Ruiz v. Morton, 462 F.2d 818, 822, (9th Cir. 1972), aff'd., 415 U.S. 199 (1974). The purposes articulated for blocking under the Act include (1) keeping hard currency away from certain countries, Veterans & Reservists for Peace in Vietnam v. Regional Commissioner, 459 F.2d 676 (3d Cir. 1972) and (2) preserving assets for future claims satisfaction, Nielsen v. Secretary of Treasury, supra, 424 F.2d 833. See Sommerfield, "Treasury Regulations Affecting Trade With the Sino-Soviet Bloc and Cuba," 19 The Business Lawyer 861 (1964). While the Secretary does not contend that Tran might turn the blocked assets over to Vietnam, he does contend that blocking assets in which Vietnam may assert an interest for future claims satisfaction.

> one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The Court in Sabbatino, supra, 376 U.S. at 428, 84 S.Ct. at 940, explained that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government....even if the complaint alleges that the taking violates customary international law." This forbearance on the part of American courts does not extend, however, to property in the United States which a foreign government attempts to take without compensation. "'Our courts will not give "extra-territorial effect" to a confiscatory decree of a foreign state, even where directed against its own nationals.'" Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1025 (5th Cir.), cert. denied, 409 U.S. 1060, 93 S.Ct. 555, 34

L.Ed.2d 512 (1972), quoting F. Palico y Compania, S.A. v. Brush, 256 F.Supp.481, 488 (S.D.N.Y.1966), aff'd mem., 375 F.2d 1011 (2d Cir. 1967).

On the strength of the territorial limitation, plaintiff argues that neither Vietnam, nor anyone whose claim derives from the confiscation by the P.R.G., would be able to recover in the United States courts the sum claimed by Tran because those courts would refuse to honor that confiscation with reference to United States based assets. Maltina Corp. v. Cawy Bottling Co., supra; Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260 (1968). But that, of course, is not the question before the Court. Vietnam is not a party to this action, and the validity of the confiscation is not in issue. What Tran seeks to do here is to convert a shield against the

enforcement of claims derived from foreign expropriation into a sword to frustrate the marshalling by the Executive Branch of assets to which a foreign government may lay claim in the future. In the territorial limitation cases, the courts have refused to give effect to confiscations in resolving disputes over ownership between the original owners and a party claiming through the confiscation. The question in those cases was whether a foreign government, or its assignee, would be able to enforce a confiscatory decree within the United States against United States based assets. Here no such issue arises, for the Court does not decide who will be entitled to the funds.

In answer, Tran argues that Vietnam would be getting the benefit of its confiscation of the Bank if the blocked assets are used in any claims settlement: Vietnam would in effect be paying the claims of

American citizens with blocked United States based funds, instead of using money from its treasury. But there is no way for this Court to know what, if any, claims settlement arrangements may be made in the future. This is a matter in the hands of the President and Congress. Speculation on possible savings to Vietnam's treasury therefore affords no basis for this Court to rule that the territorial limitation principle requires the Secretary to unblock the claimed funds.

B. Constitutional Laws

Tran further contends that the Secretary's blocking action amounts to a governmental taking without compensation. That contention must be rejected. Blocking is by its nature only a temporary action. Neither the Bank nor Tran has been divested by United States Government action of whatever right, title or interest either may have.

Tran argues that the Secretary may block the funds indefinitely. The Court recognizes that an indefinite blocking, if it "effectively deprive(s) an alien of substantially all the beenefit of his interest in property," ALI Restatement 2d, Foreign Relations Law of the United States § 192 (1965), could be a taking under international standards. But nothing before the Court indicates how long the funds may be blocked. Moreover, as the earlier discussion of the effect of the April 15 resolution shows, Tran has failed to establish that he and his fellow shareholders have a constitutionally protected property interest in the claims owned by the Bank.

In an effort to establish an ownership claim, plaintiff points to decisions in which courts have pierced the corporate veil to recognize equitable claims of shareholders to corporate assets. See Kaufman v. Societe Internationale, 343 U.S.

156, 72 S.Ct. 611, 96 L.Ed.853 (1952); Pernikoff v. Kennedy, 219 F.Supp. 854 (D.D.C.1963). These cases have no application here. In Pernikoff, the corporation was merely a shell or dry trust which existed for the benefit of its sole shareholder. And, as the court pointed out in Nielsen v. Secretary of Treasury, supra, 137 U.S.App.D.C. at 354 55, 424 F.2d. at 842 43, the issue in Kaufman arose in connection with the permanent disposition of alien property, not its preservation for future disposition. With respect to the latter, the broad sweep of the government's power was recognized in United States v. Pink, 315 U.S.203, 228, 62 S.Ct.552, 564, 86 L.Ed. 796 (1942), where the Court said:

> To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment. Russion Volunteer Fleet v. United States, 282 U.S.481, [51 S.Ct. 229, 75 L.Ed. 473]. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of

> foreign countries and whose claims arose abroad. Disconto Gesellschaft v. Umbreit, 208 U.S. 570 [28 S.Ct. 337, 52 L.Ed. 625]. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involves a regrouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts.

See also Nielsen v. Secretary of Treasury, supra, 137 U.S.App.D.C. at 358, 424 F.2d. at 846.

Those same considerations also dispose of plaintiff's equal protection claim. The fact that the Secretary may in the exercise of his discretion unblock assets of corporations confiscated by the Cuban government and primarily owned by United States citizens does not render the instant blocking a violation of plaintiff's constitutional

rights.[2] It cannot be said to be unreasonable for the Secretary to distinguish between claims by United States citizens and claims of nationals of the country whose government has confiscated their

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[2] The Secretary's action respecting assets of Cuban corporations primarily owned by American citizens was taken in response to Congressional direction:

> [T]he Committee on Foreign Relations recommends that upon application the Department of the Treasury examine with particular care each case involving Cuban assets beneficially owned by American citizens to determine whether those assets should continue to be blocked. In the committee's view, if the assets are wholly or substantially owned by citizens and residents of [the] United States they should be unblocked, since it is possible that such assets may be placed in a fund at some future date and used to pay the claims of American citizens against the Cuban Government. This would be tantamount to using the property of one U.S. citizen to pay the claim of another U.S. citizen.

Senate Report 701, 1965 U.S.Code Cong. & Admin.-News, pp. 3581, 3585.

property. See United States v. Pink, supra.[3]

C. Other Contentions

Plaintiff's other contentions are without merit. He invokes the provisions of the 1961 Treaty between the United States and the Republic of Vietnam which contain assurances that neither party shall take the property of nationals of the other without just compensation. T.I.A.S NO. 4890; 12 U.S.T. 1704 et seq., Art. IV. These provisions, however, add nothing to the constitutional claims heretofore dis-

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[3] Those shareholders who do reside in the United States, including plaintiff, have been paroled into the United States under 8 U.S.C. § 1182(d)(5). In other contexts, courts have held that since a parole alien has not been "admitted" into the United States, he stands in the same shoes as an alient resident outside the United States. Yuen Sang Low v. Attorney General of United States, 479 F.2d. 820 (9th Cir. 1973); Siu Fung Luk v. Rosenberg, 409 F.2d. 555 (9th Cir. 1969).

posed of. Moreover, under principals of international law, the treaty has terminated since one of the contracting parties no longer exists.[4]

Perry v. United States, 294 U.S. 330, 55 S.Ct.432, 79 L.Ed. 912 (1935), holding that the United States could not abrogate its obligation to repay its bonds in gold, is not on point. The United States has not repudiated its obligation to the Bank. It has simply blocked transactions involving that obligation to permit eventual resolution of the various potential claims.

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[4] ALI Restatement 2d, Foreign Relations Law of the United States § 159 (1965) states:

§ 159. Disappearance of State
If a state that is a party to an international agreement ceases to exist as a state, the agreement is terminated as to it, but the state into which it is incorporated or the states into which it is divided succeed to its rights and obligations under the agreement to the extent that
(a) the agreement defines the boundaries of the territory of the former state, or
(b) the agreement relates to the use of the territory or its natural resources.

CONCLUSION

For the reasons stated, the Court concludes that the actions of the Secretary in blocking the United States based assets in the Bank and declining to issue an unblocking license were within his authority. Accordingly, defendant is entitled to summary judgment.

IT IS SO ORDERED.

APPENDIX D

[Secretary of the Treasury's
Denial of application for
license to unblock funds]

FAC No. 82840

Mattaniah Eytan, Esquire
Kirkwood, Kaplan, Russin
& Vecchi
693 Sutter Street
San Francisco, California 94102

Dear Mr. Eytan:

Reference is made to Application B-90487 filed December 22, 1976, by your client, Tran Qui Than, a Vietnamese national residing at 745 Keeler Avenue, Berkeley, California, your letter of January 11, 1977, and your telephone conversations with Mrs. Moodie of this Office on January 11 and February 2, 1977. In the statements made by you to this Office on behalf of your client, you revealed that Mr. Than obtained payment of U.S. government contract funds from the U.S. Navy to the Dong

Phuong Bank, a Vietnamese national, in direct violation of the Foreign Assets Control Regulations.

You were informed by Mrs. Moodie on January 11, that the funds so obtained are blocked under Section 500.201(a) of the Foreign Assets Control Regulations (the "Regulations") and transfers thereof may be made without a Treasury license. You are hereby advised that Application B-90487 which seeks authorization to obtain a similar contract payment from the Army is hereby denied.

Your communications with this Office indicated that the Navy payments were made after April 30, 1975 (the "effective date" of the Regulations with respect to Viet-Nam) under contracts entered into prior to the effective date with Vietnamese enterprises. These contracts had been assigned to Dong Phuong Bank prior to April 30, 1975. (A copy of a letter from the Navy's

office in Thailand, identifying the contracts was enclosed with Application B-90487.)

The Dong Phuong Bank, a Vietnamese corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The actions of the shareholders and directors of the Bank described in the Applications were ineffective to dissolve it or transfer its assets. The Resolution did not even purport to transfer the bank's interest in the United States as-

sets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Viet-Nam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Viet-Nam.

In your communications with this Office, you advised that the Navy Department had made payments directly to your client, Mr. Tran Qui Than, representing the Dong Phuong Bank rather than to the contractors which were ostensibly due the funds. You were advised that these funds were blocked because of the interest therein of the Bank, a Vietnamese national, and that the funds must be traced and placed in blocked accounts. You were requested to furnish details of the payments, including the amounts, dates of payments, method of pay-

ment, and persons to whom paid. You agreed to convey this request to your client and to furnish the information.

On February 2, 1977, you informed Mrs. Moodie that you relayed to your client the advice provided by this Office but you did not advise your client that you agreed that the funds were blocked. To the contrary, you stated that you were considering advising your client not to place the funds in a blocked account in the name of the Dong Phuong Bank and to institute legal action to prevent Mr. Than from being compelled to do so.

Since this Office has not received any response to our request for details concerning the payments made by the U.S. Navy, enclosed is a subpoena addressed to your client for delivery to Mr. Than. Also enclosed is a subpoena addressed to you regarding your knowledge of, and any actions by you regarding any payments by the

Navy to either you or your client.

Very truly yours,

Stanley L. Sommerfield
Acting Director
Office of Foreign Assets Control

Enclosures

ORDER TO APPEAR AND

FURNISH INFORMATION

THE SECRETARY OF THE TREASURY

To: Mattaniah Eytan, Esq.
693 Sutter Street
San Francisco, California 94102

GREETING:

Pursuant to Section 5(b) of the Trading with the Enemy Act, as amended, and Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, YOU ARE HEREBY REQUIRED to appear before Richard J. Hollas a representative of this Department, or before any person designated by him, at 1331 G Street, NW, Rm. 400, Washington, DC on the 9th day of March, 1977, at 10:30 AM of that day, to furnish complete information under oath relative to payments made by the U.S. Navy after April 30, 1975, under contracts on

which the Dong Phuong Bank was the assignee, including but not limited to:

1. The amounts paid under each such contract.

2. The date of payment.

3. The person or persons to whom the payments were made.

4. The method of payment.

5. The names of the officers of the U.S. Navy who authorized the payments and the Navy facility that effected the payments.

6. The present location of all of the funds that were paid to Mr. Than either individually or as an officer of the Dong Phuong Bank, or as representative of the shareholders of the Bank in the United States.

7. Representations made to the Navy regarding who was entitled to receive payment of the funds.

You are further required to make available for examination at such time all

records within your custody or control relative to the payments, including all books of accounts, records, contracts, letters, memoranda, or other papers.

PLEASE TAKE NOTICE that Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, provides that:

> "Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary of the Treasury or any person acting under his direction or authorization complete information relative to any transaction subject to the provisions of this part. The Secretary of the Treasury or any person acting under his direction may require that such reports include the production of any books of account, contracts, letters, or other papers, connected with any such transaction in the custody or control of the persons required to make such reports. Reports with respect to transactions may be required either before or after such transactions are completed. The Secretary of the Treasury may, through any person or agency, investigate any such transaction or any violation of the provisions of this part regardless of whether any report has been required or filed in connection therewith."

PLEASE TAKE FURTHER NOTICE that Section 5(b) of the Trading with the Enemy Act, as amended, provides in part that whoever willfully violates any order or regulation issued thereunder:

> "shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

PLEASE TAKE FURTHER NOTICE that the records, documents or other material (including written reports or oral interviews under oath) furnished pursuant to this Order will be used primarily by the FAC in furtherance of its enforcement of 50 U.S.C., App.5(b) and 31 C.F.R., Part 500 (Foreign Assets Control Regulations). However, some information from such records, documents, et cetera, may be furnished to other interested Federal agencies relative to matters which are within

the jurisdiction of such agencies. Failure to furnish information as requested may result in a citation for contempt or criminal indictment for a willful violation of Section 500.602 of the Foreign Assets Control Regulations.

ISSUED this day of , 19 , by virtue of and pursuant to powers and authority delegated by the President of the United States to the Secretary of the Treasury by Executive Order 9193.

For and on behalf of the Secretary of the Treasury:

Stanley L. Sommerfield
Acting Director
Foreign Assets Control

ORDER TO APPEAR AND

FURNISH INFORMATION

THE SECRETARY OF THE TREASURY

To: Mr. Tran Qui Than
745 Keeler Avenue
Berkeley, California 94708

GREETING:

Pursuant to Section 5(b) of the Trading with the Enemy Act, as amended, and Section 500.602 of Chapter V of Title 31 of the Code of Federal Regulations, 31 CFR 500.602, YOU ARE HEREBY REQUIRED to appear before Richard J. Hollas a representative of this Department, or before any person designated by him, at 1331 G Street, NW, Rm. 400, Washington, DC on the 9th day of March, 1977, at 10:30 AM of that day, to furnish complete information under oath relative to payments made by the U.S. Navy after April 30, 1975, under contracts on

which the Dong Phuong Bank was the assignee, including but not limited to:

1. The amounts paid under each such contract.

2. The date of payment.

3. The person or persons to whom the payments were made.

4. The method of payment.

5. The names of the officers of the U.S. Navy who authorized the payments and the Navy facility that effected the payments.

6. The present location of all of the funds that were paid to Mr. Than either individually or as an officer of the Dong Phuong Bank, or as representative of the shareholders of the Bank in the United States.

7. Representations made to the Navy regarding who was entitled to receive payment of the funds.

You are further required to make available for examination at such time all

records within your custody or control relative to the payments, including all books of accounts, records, contracts, letters, memoranda, or other papers.

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> "Every person is required to furnish under oath, in the form of reports or otherwise, from time to time and at any time as may be required by the Secretary of the Treasury or any person acting under his direction or authorization complete information relative to any transaction subject to the provisions of this part. The Secretary of the Treasury or any person acting under his direction may require that such reports include the production of any books of account, contracts, letters, or other papers, connected with any such transaction in the custody or control of the persons required to make such reports. Reports with respect to transactions may be required either before or after such transactions are completed. The Secretary of the Treasury may, through any person or agency, investigate any such transaction or any violation of the provisions of this part regardless of whether any report has been required or filed in connection therewith."

PLEASE TAKE FURTHER NOTICE that Section 5(b) of the Trading with the Enemy Act, as amended, provides in part that whoever willfully violates any order or regulation issued thereunder:

> "shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

PLEASE TAKE FURTHER NOTICE that the records, documents or other material (including written reports or oral interviews under oath) furnished pursuant to this Order will be used primarily by the FAC in furtherance of its enforcement of 50 U.S.C., App.5(b) and 31 C.F.R., Part 500 (Foreign Assets Control Regulations). However, some information from such records, documents, et cetera, may be furnished to other interested Federal agencies relative to matters which are within

the jurisdiction of such agencies. Failure to furnish information as requested may result in a citation for contempt or criminal indictment for a willful violation of Section 500.602 of the Foreign Assets Control Regulations.

ISSUED this day of , 19 , by virtue of and pursuant to powers and authority delegated by the President of the United States to the Secretary of the Treasury by Executive Order 9193.

For and on behalf of the Secretary of the Treasury:

Stanley L. Sommerfield
Acting Director
Foreign Assets Control

APPENDIX E

31 C.F.R. § 500.201

(a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him), by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country,or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect.

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States:

* * * * *

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States;

* * * * *

(d) The term "designated foreign country means a foreign country in the following schedule, and the terms "effective date" and "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area:

PART I

1. North Korea, i.e., Korea north of the 38th parallel of north latitude: December 17, 1950.

2. Cambodia: April 17, 1975.

3. North Viet-Nam, i.e., Viet-Nam north of the 17th parallel of north latitude: May 5, 1964.

4. South Viet-Nam, i.e., Viet-Nam south of the 17th parallel of north latitude: April 30, 1975 at 12:00 p.m. e.d.t.

31 C.F.R. §500.312

The term "interest" when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect.

31 C.F.R. §500.505

The following are hereby licensed as unblocked nationals:

(a) Any individual in the United States except an individual who on or after the "effective date" was in, or who, on or since such date, has acted or purported to act directly or indirectly for the benefit of or on behalf of any designated foreign country.

(b) Any individual in the United States who has been paroled into the United States pursuant to section 212(d)(5) of the Immigration Act and Nationality Act of 1952 (66 Stat. 181; 8 U.S.C. 1181-1185) by the Attorney General provided that this subsection shall not apply:

* * * * *

22 U.S.C. §1645

(a) The Secretary of the Treasury may establish in the Treasury of the United States the Claims Fund for the payment of unsatisfied claims of nationals of the United States against Vietnam, as authorized by this subchapter.

(b) The Secretary of the Treasury shall deduct from any amounts covered into the Claims Fund an amount equal to 5 per centum thereof as reimbursement to the Government of the United States for expenses incurred by the Commission and by the Trea-

sury Department in the administration of this subchapter. The amounts so deducted shall be covered into the Treasury as miscellaneous receipts.

50 U.S.C. §1702

(a)(1) At the times and to the extent specified in section 1701 of this title [i.e., in times of national emergency], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise --

* * * * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions

involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. App. §9

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and

held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of

such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall

determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39 and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated; Provided further, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale

of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so

sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency,and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net pro-

ceeds of the sale in an amount not to exceed the amount the claimant would have recieved had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

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No. 81-2219

In the Supreme Court of the United States

OCTOBER TERM, 1982

TRAN QUI THAN, PETITIONER

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Treasury abused his discretion in determining that assets in the United States of a bank incorporated under the laws of the Republic of Vietnam by Vietnamese nationals and doing business in that country were properly blocked under the Foreign Assets Control Regulations promulgated pursuant to Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. (& Supp. IV) App. 5(b), and in declining to issue a license authorizing the transfer of such assets.

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DONALD T. REGAN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 658 F.2d 1296. The opinion of the district court (Pet. App. C1-C34) is reported at 469 F. Supp. 1202.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1981, and a petition for rehearing was denied on March 1, 1982 (Pet. App. B1). The petition for a writ of certiorari was filed on June 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Tran Qui Than filed this action against the Secretary of the Treasury seeking a declaratory judgment that he is entitled to a license unblocking certain frozen assets in the United States allegedly belonging to the Dong Phuong Bank, a Vietnamese bank in which he was a shareholder and officer. The Secretary had denied his application for such a license pursuant to the Trading With the Enemy Act, 50 U.S.C. (& Supp. IV) App. 5(b), and the Foreign Assets Control Regulations, 31 C.F.R. 500.101 *et seq.* (Pet. App. A2). The district court upheld the Secretary's decision (Pet. App. C1-C34), and the court of appeals affirmed (Pet. App. A1-A39).[1]

1. Petitioner is a citizen and national of the Republic of Vietnam (South Vietnam), although he now resides in the United States (Pet. App. A2-A3).[2] Prior to April 25, 1975, petitioner resided in Saigon, where he was a shareholder and officer of the Dong Phuong

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[1] The court of appeals remanded for further proceedings in connection with the Secretary's demand that certain funds paid to petitioner from a Navy contract payment be placed in a blocked account (Pet. App. A37-A38). No question concerning that remand is presented here.

[2] In the court of appeals (Pet. App. A2), petitioner did not dispute the facts as stated by the district court (Pet. App. C2-C8). Than Br. 6. Some of the facts as stated by the courts below were based on the record developed in the district court, which included answers to interrogatories, depositions, and affidavits. However, the court of appeals held that its review of the Secretary's decision was limited to the administrative record that was before him at the time of his decision, "not considering some new record that was made in the district court subsequent to the Secretary's decision" (Pet. App. A22 n.12, citing *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973)). In any event, the additional facts in the district court record would not alter the result in this case.

Bank (*ibid.*). He left Vietnam on April 25, 1975, just before the take-over of the country by Communist forces, and arrived in the United States shortly thereafter (Pet. App. A2, C3).

The Dong Phuong Bank was incorporated in 1968 under the laws of the Republic of Vietnam (Pet. App. A3).[3] Some ten directors held more than 80% of all shares of the bank. Petitioner was the largest single shareholder, with just under 13% of the outstanding shares (*ibid.*).[4] On April 15, 1975, the directors and shareholders of the Bank met "to consider the consequences to the Bank which might follow the defeat of the South Vietnamese forces" (*ibid.*). Those present adopted a resolution providing in part:

> 2. Accordingly, the Management Board decides that those among the Management Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phoung Bank in banks located out of Vietnam as well as the properties that the Dong Phoung Bank possesses abroad.
>
> 3. At the same time, the Management Board empowers those among the Management Board members who will remain in Vietnam to manage and to make use of the properties of the Dong Phuong Bank located in the country.

---

[3] According to petitioner, the bank was the largest private commercial bank in South Vietnam, with 22 branches, second in size only to the government bank (Than Dep. 26; C.A. App. 148) ("Than Dep." refers to the deposition of Tran Qui Than dated Sept. 27, 1977; "C.A. App." refers to the appendix filed in the court of appeals).

[4] At the time of the proceedings in the district court, two shareholders, including petitioner, resided in the United States, as did the heirs of a third, who died here. Four shareholders still resided in Vietnam. The remaining shareholders were either in France or Hong Kong. C.A. App. 147.

> The present decision will be enforced beginning the day when the Saigon metropolis will be occupied by the Communist government.

(Pet. App. A5 n.2).

On April 30, 1975, South Vietnam fell to Communist forces (Pet. App. A3), who issued a communique on May 1, 1975 stating "that banks would be confiscated and * * * 'managed by the revolutionary administration' " (*id.* at A5).[5] The Foreign Assets Control Regulations, issued under Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. App. 5(b), were made applicable to South Vietnam on "April 30,

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[5] Subsequent broadcasts and news articles indicated that private banks nevertheless continued to operate after May 1, 1975. A broadcast on August 30, 1975, announced a decision of the Council of Ministers of the Provisional Revolutionary Government that "[o]perations of private banks and credit firms * * * are hereby discontinued" and specified procedures for "liquidation under the guidance of the National Bank of Vietnam * * *," including payment of customers' accounts and deposits and collections of debts (C.A. App. 198). The private banks were then to "settle the problem of property with the National Bank and shareholders" (C.A. App. 200). This announcement also was reported in the Bangkok *Post*, which stated that the decree specifically referred to the Dong Phuong Bank (C.A. App. 333). Mr. Le Van Lo, one of the Bank's directors, confirmed this announcement, on information and belief (C.A. App. 160). It also was supported by an article in the Far Eastern Economic Review on October 3, 1975, which was attached to Mr. Lo's affidavit (C.A. App. 176). Whatever the meaning or significance of the Vietnamese term translated as "confiscation" in the May 1 communique may be, these subsequent broadcasts and announcements provide some indication that private banks, including the Dong Phuong Bank, were open as late as August 1975, to pay out deposits and collect loans and that some kind of settlement was to occur with their shareholders. None of this information was in the record before the Secretary, but it does provide further support for his decision.

1975 at 12:00 p.m. e.d.t." 31 C.F.R. 500.201(b)(2)(d) (Pet. App. A6-A9 & n.5). The Regulations prohibit all transactions involving transfers or payments of virtually any kind of property, including credits, currency or otherwise, if they "involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect * * *." 31 C.F.R. 500.201(a) and (b). "National" includes a corporation organized under the laws of a designated country. Section 500.302(a)(2).

At the time the revolutionary government issued its confiscation communique, the Dong Phuong Bank "was the assignee of monies owed to certain local Vietnamese contractors under several contracts with the United States Army and Navy" (Pet. App. A5-A6).* The contractors had performed the work on the contracts, but full payment had not been made by the United States at the time South Vietnam fell (*id.* at A6 n.4). The balance due on the Army contract involved in this case is $221,235.00 (*id.* at A6).

2. After his arrival in the United States, petitioner, acting on behalf of the Bank, sought payment

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* According to petitioner, as of May 1, 1975, the Dong Phuong Bank had over half a million dollars in assets in bank accounts and contracts outside of Vietnam, to which the shareholders' resolution arguably applied (C.A. App. 143-145). It also had 164.24 pounds sterling in an account in London. (C.A. App. 145). The dollar assets consist of a total of $208,661.54 on deposit in banks in the United States and $87,031.70 in a bank in Paris (C.A. App. 144-145). The bank accounts in the United States are also frozen and are the subject of other suits, which have been stayed pending the outcome in this case. *Tran Qui Than* v. *City Bank International*, No. C-79-0166 WWS (N.D. Cal., filed Jan. 26, 1979); *Tran Qui Than* v. *First National City Bank*, No. 77 Civ. 6316 (S.D.N.Y., filed Dec. 30, 1977).

of the amount due from the Army (Pet. App. A6). The Army refused to pay without an unblocking license from the Secretary of the Treasury (*id.* at A8-A10).[7] Petitioner filed an application for a license with the Secretary's Office of Foreign Assets Control on December 22, 1976 (*id.* at A10).

On February 22, 1977, the Secretary, through the Office of Foreign Assets Control, denied the application, stating (Pet. App. D3):

> The Dong Phuong Bank, a Vietnamese Corporation, is a designated national under the Regulations. The Regulations prohibit, in the absence of a Treasury license, all transactions involving assets in the United States in which a Vietnamese national has, or has had on or since April 30, 1975, any interest whatsoever. On April 30, 1975, the Bank had an interest in the funds due under all contracts which had been assigned to it. This interest could not be transferred after April 30, 1975, without a license from this Office.

The Secretary specifically rejected petitioner's claim that the resolution of the directors on April 15, 1975 was effective to dissolve the Bank prior to the blocking of the Bank's American-based assets (*id.* at D3-D4):

> The actions of the shareholders and directors of the Bank described in the Applications were ineffective to dissolve it or transfer its assets.

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[7] A balance of $49,965.06 due on a Navy contract was inadvertently paid to a Vietnamese contractor without an unblocking license after petitioner signed a release of the Bank's claim as assignee of those payments. Of that sum, petitioner was paid $29,975.44 as the Bank's share. He retained $5,798.00 and distributed the remainder among other shareholders of the Bank (Pet. App. A 0). That payment is not involved in this petition. See note 1, *supra*.

> The Resolution did not even purport to transfer the bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the Resolution effected a valid dissolution of the corporation under the laws of South Viet-Nam. Accordingly, there was neither a dissolution nor a transfer made prior to April 30, 1975, of the Bank's interest in the funds to the shareholders who left Viet-Nam.

Petitioner did not request an opportunity "to present additional information or discuss or argue the application [either] before or after the decision," as permitted by the Regulations. 31 C.F.R. 500.801(b)(3). Nor did he request a hearing. Section 500.802. See Pet. App. C11.

3. On June 23, 1977, petitioner filed this action against the Secretary in the United States District Court for the Northern District of California (Pet. App. A12, C8). Petitioner contended (1) that the Secretary erred in concluding that the Bank was a "designated national" and that he was not entitled to an "unblocking" license under the Regulations; (2) that the refusal to issue a license was a taking of property without just compensation, in violation of the Fifth Amendment, and a discrimination against aliens, in violation of the Fourteenth Amendment; and (3) that the Secretary's action violated petitioner's rights under the Treaty of Amity and Economic Relations of 1961, United States of America—Republic of Vietnam, 12 U.S.T. 1703, T.I.A.S. No. 4890 (Pet. App. A12-A13).

The district court held that the Secretary's decision was subject only to limited judicial review

under the Administrative Procedure Act, 5 U.S.C. 706(2)(A)-(C) (Pet. App. C10-C12). It agreed that the Bank was a "designated national" and that "[o]n their face, the Regulations apply to the Dong Phuong Bank as the Secretary has determined" (*id.* at C14). The court noted that petitioner did "not dispute that the Regulations, so interpreted, apply to block the transaction at issue" (*ibid.*). The district court also ruled that the Secretary's determination that the Bank had not been dissolved prior to blocking was not "arbitrary, capricious, an abuse of discretion, or contrary to law" (*id.* at C16). Accordingly, it upheld the Secretary's refusal to issue an "unblocking" license to petitioner (*id.* at C22-C27). It also held that no "taking" had occurred within the meaning of the Fifth Amendment (*id.* at C27-C30), and that, in any event, petitioner and the other shareholders had not shown that they had a "protected property interest in the claims owned by the Bank" (*id.* at C28). The court further concluded that there was no denial of equal protection resulting from any distinction "between claims by United States citizens and claims of nationals of the country whose government has confiscated their property" (*id.* at C30-C32, citing *United States* v. *Pink*, 315 U.S. 203 (1942)). Finally, the court held that the Treaty invoked by petitioner terminated upon the fall of the Republic of Vietnam and thus gave no support to his claim (Pet. App. C32-C33).

4. The court of appeals affirmed (Pet. App. A1-A36). The court upheld the Secretary's decision that the Dong Phuong Bank is a "designated national" under the Regulations and that the April 15 resolu-

tion had not dissolved the corporation and transferred its American-based assets to the shareholders (*id.* at A20-A23). The court observed that the resolution did not by its express terms accomplish such a dissolution and transfer and that, in any event, "[n]o mention is made of any authorization for those shareholders to own those assets outright" (*id.* at A22-A23). The court rejected petitioner's claim that the Bank had been "seized and destroyed upon the fall of Saigon," before the effective date of the Regulations, because that issue had not been presented to the Secretary and could not be raised for the first time in the district court or on appeal (*id.* at A23-A24).

Petitioner's other claims were found lacking for largely the same reasons articulated by the district court (Pet. App. A24-A36). Thus, the court of appeals held that the Secretary's decision did not give extraterritorial effect to any purported expropriation of the Bank's assets in the United States (*id.* at 28). In the court's view, the decision, as required by the Regulations, merely blocks those assets temporarily, "until a resolution of American claims is made or some other political agreement is reached with [Vietnam]" (*ibid.*).

The court of appeals also rejected petitioner's "taking" argument, noting that "[t]he Trading with the Enemy Act and the Regulations * * * received the constitutional imprimatur of the Supreme Court in *Propper* v. *Clark*, 337 U.S. 472 (1949)" (Pet. App. A28-A29). In addition, the court found no basis for petitioner's equal protection argument. It held that the Regulations' distinction between property belonging to individuals or partnerships and that of corporations was "rationally related to a legitimate governmental interest" and did not involve a suspect class

(*id.* at A32-A36). The court found it reasonable to assume that the successor government in Vietnam might assert an interest in the assets of corporations organized under the laws of the Republic of Vietnam (*id.* at A35). The court noted as well that the successor government might "assert an interest in the Bank's assets held in this country [and] that the United States could use the blocked funds as a diplomatic negotiating tool" (*id.* at A36), observing that the United States had recently done so in connection with recognition of the People's Republic of China and in resolving the hostage crisis in Iran (*id.* at A36 n.18).

ARGUMENT

The court of appeals correctly sustained the Secretary's determination that a national of Vietnam had an interest in the funds in issue when they were blocked and that those funds should remain temporarily blocked under the Foreign Assets Control Regulations. The decision below is fully consistent with this Court's decision in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), and does not conflict with any decision of another court of appeals. This largely fact-bound case does not merit further review.

1. In *Dames & Moore* v. *Regan*, *supra*, this Court reaffirmed the broad powers of the President with respect to the freezing of assets of the nationals of a hostile foreign country. *Dames & Moore* sustained the President's exercise of his powers under a section of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. (Supp. IV) 1702, that was "directly drawn" from Section 5(b) of the Trading With the Enemy Act (TWEA), 50 U.S.C. (& Supp. IV) App. 5(b), the specific statutory provision involved in this case. 453 U.S. at 671. The Court held

that "both the legislative history and cases interpreting the TWEA fully sustain the broad authority of the Executive when acting under this congressional grant of power" (*id.* at 672). The Court explained (*id.* at 673):

> This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." *Propper* v. *Clark*, 337 U.S. 472, 493 (1949). Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country.

Here, as in *Dames & Moore*, the President's action in blocking Vietnamese assets in this country, "taken pursuant to specific congressional authorization * * *, is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" 453 U.S. at 674, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Petitioner has wholly failed to satisfy this burden.

The Committee Reports on IEEPA, enacted in 1977, discuss the asset control regulations under the TWEA that were then in effect for Vietnam and certain other countries (see H.R. Rep. No. 95-459, 95th Cong., 1st Sess. 6 & nn.17-21 (1977); S. Rep. No. 95-466, 95th Cong., 1st Sess. 3 (1977), and the enactment of the comparable authority in IEEPA therefore must be seen as a ratification of the general approach under those regulations. See *Haig* v. *Agee*, 453 U.S. 280, 301 (1981). Moreover, the Court spe-

cifically observed in *Dames & Moore* that Congress had amended the International Claims Settlement Act to provide for submission of claims of United States nationals against Vietnam to the Foreign Claims Settlement Commission, in order to establish an inventory of losses so that recovery could be achieved " 'through future direct Government-to-Government negotiation of private property claims' " (453 U.S. at 681, quoting H.R. Rep. No. 96-915, 96th Cong., 2d Sess. 2-3 (1980). See 22 U.S.C. (Supp. IV) 1645 *et seq.* The House Report on the amendment acknowledged that "[t]he United States controls some $140 million in assets of the Government, firms, and nationals of Vietnam," and expressed the "intent and expectation * * * that Vietnamese assets will remain frozen pending settlement of U.S. claims against Vietnam." H.R. Rep. No. 96-915, *supra*, at 3; accord, 126 Cong. Rec. S16572 (daily ed. Dec. 15, 1980) (remarks of Senator Zorinsky). Thus, Congress has authorized the blocking regulations in the Trading With The Enemy Act and ratified their application to the assets of Vietnamese nationals.

Petitioner has not advanced any reason for the Court to examine once again the well settled principles reviewed in *Dames & Moore* as applied to corporately owned Vietnamese assets in this country. Indeed, petitioner does not truly challenge the validity of the regulations as applied to Vietnamese property. Rather, petitioner's entire argument depends on his assertion that the assets involved in this case should be considered to be his *personal* property and that because he now resides in the United States, the property does not belong to a Vietnamese national. The Secretary of the Treasury, the district court, and the court of appeals all rejected that fact-bound contention, concluding that the assets are properly blocked

under the Regulations. This narrow question does not warrant review.

2. It was undisputed on the administrative record before the Secretary that the Dong Phuong Bank was a private commercial bank organized under the laws of South Vietnam and that the claim to the proceeds of the Army contract involved here was in the name of this Vietnamese Bank (C.A. App. 396, 398, 400, 413-415). Based on these undisputed facts alone, the Secretary correctly determined that the Bank is a "designated national" within the meaning of the Regulations (31 C.F.R. 500.302(a)(2) and 500.305) and that transfers of its assets in the United States are prohibited (31 C.F.R. 500.201(a) and (b)). See *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833, 837-838 (D.C. Cir. 1970). See also *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F.2d 923 (D.C. Cir.), cert. denied, 370 U.S. 940 (1962) (assets of Dutch bank in United States properly vested in Alien Property Custodian because bank was incorporated within territory occupied by Germany). This conclusion is not altered by petitioner's contention that the bank has ceased doing business in Vietnam. *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 44 (1925). Both courts below held that the Secretary's determination that the assets are properly blocked was correct; indeed, the district court noted that petitioner "does not dispute that the Regulations, so interpreted, apply to block the transaction at issue here" (Pet. App. C14).

Instead, petitioner argued below and suggests here (Pet. 37-38) that the shareholders should be held to have effected a contingent "dissolution" of the Bank in their meeting of April 15, 1975. The Secretary correctly rejected this claim (Pet. App. D3-D4), and

the court of appeals and the district court upheld his determination. There is no occasion for this Court to review these factual findings of the two courts below. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, petitioner's suggestion that it was arbitrary and capricious for the Secretary not to give effect to this purported "dissolution" is wholly without merit.

The only basis for petitioner's claim that the Bank was dissolved as a corporate entity or that its assets outside Vietnam were transferred to him and other shareholders is the resolution of April 15, 1975. That resolution states in pertinent part (Pet. App. A5 n.2):

> [T]hose * * * Board members who will be able to leave the country will be qualified to manage and to make use of all the accounts of the Dong Phuong Bank in banks located out of Vietnam as well as the properties that the Dong Phuong Bank possesses abroad.

Petitioner's application for a license did not in so many words assert that the Bank was dissolved or even refer to the resolution (C.A. App. 396-399); indeed, petitioner stated that he "desire[d] a license in order to execute a release, *in behalf of the Dong Phuong Bank*" (C.A. App. 398; emphasis added).[8]

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[8] The shareholders' resolution, drafted with a vagueness that apparently was deliberate, admittedly had the purpose of evading the laws of the Republic of Vietnam, which then prohibited corporate dissolutions (C.A. App. 149; Than Dep. 16). It should, accordingly, be viewed with the greatest circumspection in the present setting, because it could easily be read to the contrary should creditors or depositors of the Bank appear to lodge claims against the shareholders individually or if it otherwise seemed in their interest to do so. See *Schmieder* v. *Hall*, 545 F.2d 768 (2d Cir.), aff'g 421

The application did refer to an opinion letter to petitioner from his counsel that discussed the resolution, although even counsel did not claim that the resolution itself effected a dissolution or transfer. Rather, he stated that (C.A. App. 401):

> [T]he resolution * * * constitutes authorization for those directors in the United States to either operate the business of the Bank here in the United States or to dissolve the Bank's activities in the United States and distribute its assets here in the United States to creditors and shareholders.

In any event, petitioner made no allegation that there was notice of any purported transfer of assets given either to the Army or to any of the other holders of American-based assets prior to blocking, which is required to establish the validity of such a transfer. 31 C.F.R. 500.203(b). Accordingly, there is no basis for review by this Court of petitioner's contentions as to the effect of the shareholders' resolution.

3. Petitioner argued below in the alternative that he is entitled to receive the funds on behalf of the stockholders because the Bank ceased to exist as a corporate entity upon the fall of Saigon. The court of appeals correctly rejected this assertion because

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F. Supp. 1208, 1212 n.5 (S.D.N.Y. 1976); *Standard Oil Co.* v. *Clark*, 163 F.2d 917, 920, 923 (2d Cir. 1947), cert. denied, 333 U.S. 873 (1948); *Beck* v. *McGrath*, 182 F.2d 315, 316 (2d Cir. 1950). "Trust" arrangements designed to evade the purposes of the Trading With The Enemy Act have been rejected by the courts. *Herrmann* v. *Rogers*, 256 F.2d 871 (9th Cir. 1958), remanded, 358 U.S. 332 (1959), prior opinion reaffirmed 274 F.2d 842 (9th Cir.), cert. denied, 364 U.S. 821 (1960); *Koehler* v. *Clark*, 170 F.2d 779 (9th Cir. 1948). See *Stoehr* v. *Wallace*, 255 U.S. 239 (1921).

it was not first presented to the Secretary (Pet. App. A23-A24), concluding that the district court therefore had erred in addressing this contention on the merits (*id.* at C20-C22). It is difficult to ascertain whether petitioner renews that contention here (see Pet. 12, 16, 30, 31), despite this procedural defect. In any event, petitioner's argument is groundless.

First, even assuming that the Bank ceased to exist and that its assets were expropriated prior to the effective application of the blocking regulations, petitioner's claim to the assets is not advanced thereby. The Regulations block not only assets belonging to designated nationals, such as the Bank, but also "property in which *any designated foreign country* * * * had any interest of any nature whatsoever, direct or indirect" (31 C.F.R. 500.201(a) (emphasis added)). As the district court noted, "[a] government with the power to expropriate also has the power to assert a claim as the successor to an expropriated bank's foreign-based assets" (Pet. App. C21).[9]

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[9] Petitioner erroneously contends (Pet. 35-36) that this conclusion conflicts with the Fifth Circuit's decision in *Real* v. *Simon*, 510 F.2d 557 (1975). On the facts of that case, the court of appeals invalidated the continued blocking of funds in a Miami account of a deceased Cuban national because all of the heirs resided in the United States. The Fifth Circuit was careful to point out, however, that "[t]here is no contention by the United States that the Cuban government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property." 510 F.2d at 561. Here, in contrast, there is a distinct likelihood that the Government of Vietnam would assert an interest in the property, and several of the shareholders of the Bank apparently still are in Vietnam. See note 4, *supra*. The court in *Real* v. *Simon* also distinguished *Nielsen* v. *Secretary of Treasury*, *supra*, on the ground that that case, like the instant case, involved assets

Moreover, on the administrative record before the Secretary, there was no evidence to support the claim that at the time of the freezing of Vietnamese assets, the Bank had been expropriated without any provision for compensation. Petitioner presented only the unsupported assertions of counsel in his opinion letter (C.A. App. 401-402). Nor was there evidence to support the claim that the Bank never opened again after April 1975. Indeed, petitioner's counsel stated that "[o]n or before *September 1, 1975*, the Communist Government of Vietnam nationalized all privately-held banks in Vietnam," and that "[*s*]*ince then*, the Dong Phuong Bank has not operated in Vietnam as a private bank at all" (C.A. App. 401) (emphasis added). The September 1, 1975 date, of course, was some four months after the date on which petitioners asserted below that the Bank's assets had been expropriated.

In addition, although the courts below properly considered only the administrative record, the submissions of petitioner to the district court strongly suggest that the Bank in fact did do business in a private capacity after April 30, 1975, the effective date of the blocking order, and that the present government of South Vietnam would almost surely assert an interest in the blocked assets of the Dong Phuong Bank. See note 5, *supra*. If the Bank *did* do business after April 30, 1975, its assets are obviously blocked as those of a "designated national," although they also are blocked by the mere fact that the Bank is a "corporation * * * organized under the laws of"

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belonging to an entity incorporated in and therefore having the nationality of the country against which the blocking order was directed. 510 F.2d at 561.

Vietnam. 31 C.F.R. 500.302(a)(2). Even if that subsequent activity was under the auspices of the revolutionary National Bank, the assets nevertheless would be blocked as those of a "designated foreign country." 31 C.F.R. 500.201.

Petitioner has admitted that major corporations, such as the Bank, were not permitted to dissolve at the time in question here (C.A. App. 149; Than Dep. 16). But despite that prohibition, he claims that the private resolution of the Bank's shareholders was effective to wind up the affairs of the largest private commercial bank in Vietnam, with total assets worth $29.5 million and loans outstanding of more than half that amount (see C.A. App. 161, 163).

Although the Regulations authorize individuals who were in partnerships or had sole proprietorships to obtain unblocking licenses under certain circumstances, even then the Secretary has required "[d]etailed information," lacking here, regarding assets, debts, and creditors. 31 C.F.R. 500.558 and 500.559. In any event, this case involves a corporate legal entity, not a partnership or sole proprietorship. It is entirely reasonable for the Secretary to treat corporations as having a legal existence separate and apart from its shareholders. *Nielsen* v. *Secretary of Treasury*, *supra*, 424 F.2d at 843; *Agajan* v. *Clark*, 381 F.2d 937, 939 (D.C. Cir. 1967). Accord *Restatement* (*Second*) *Foreign Relations Law of the United States* § 27 (1965). Petitioner and the other shareholders deliberately chose to form a separate corporate entity. As is the law in most nations, they thereby were protected from individual liability for the debts of the corporation (see Than Dep., Exh. 2, Art. 28, at 3). They cannot now so readily ignore the corporate entity they created, treat its assets and those of the

Bank's depositors as their own, and ignore its possible liabilities.[10]

The decision in *Nielsen* v. *Secretary of Treasury*, *supra*, is in accord with the decision below in this respect. There the court of appeals rejected virtually identical claims involving frozen assets of a Cuban corporation, three-fourths of the stock of which was owned by persons who had emigrated to the United States or other western countries prior to the effective date of the blocking order. 424 F.2d at 835-836. After the stockholders emigrated and after the effec-

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[10] In the district court, petitioner claimed there was a "run" on the Bank and that most depositors were able to withdraw their deposits (C.A. App. 163, 169; Than Dep. 17-18, 27). However, he was curiously silent about the Bank's creditors—how many there were, where they might be located, or the amount of the Bank's debt. Petitioner was not without some information about these matters, since immediately before adoption of the resolution, he gave the directors and shareholders a report on the assets *and liabilities* of the Bank for the first quarter of 1975 (C.A. App. 404). No such report was provided the Secretary or the district court.

It is not unreasonable to assume that the Bank had substantial creditors in Vietnam and perhaps elsewhere. The most obvious such creditor is the National Bank, to which the Dong Phuong Bank pledged its assets, such as treasury bills and loans, in order to meet the liquidity problem presented by the "run" of depositor withdrawals (C.A. App. 169; Than Dep. 27-28, 33). In the event that the Dong Phuong Bank's borrowers failed to make their payments, the National Bank no doubt would have recourse against the Dong Phuong Bank.

Finally, even as to the particular payment due under the Army contract in this case, petitioner failed to establish what amount, if any, was due to the Bank. The contractor's assignment of proceeds to the Bank was for purposes of collection and authorized the Bank to receive for its own account only that amount due it; the remainder was to be deposited to the account of the contractor itself (C.A. App. 413).

tive date of the blocking order, the Cuban government seized the corporation's property and terminated its operations. *Ibid.* Nevertheless, the court of appeals sustained the Secretary's denial of license applications of the individual shareholders for the release of frozen assets belonging to the corporation.[11]

4. Petitioner suggests (Pet. 30-32) that by refusing to issue an unblocking license, the Secretary has given extraterritorial effect in the United States to an allegedly confiscatory expropriation of the assets of the Dong Phuong Bank by the present Government in South Vietnam (*ibid.*). The courts below correctly rejected this contention (Pet. App. A28, C25-C26).

The Secretary plainly has not given extraterritorial effect to a purported expropriation of the Bank's assets in the United States by the Government of Vietnam. The Government of Vietnam is not a party to this suit, and it has not asserted any claim to the assets involved here. Nor does the Secretary's refusal to unblock the assets at this time serve to vest title to them in Vietnam. These assets are simply subject to a temporary blocking that preserves the status quo until American claims are resolved or some other political agreement is reached. This Court has recognized

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[11] Petitioner's reliance (Pet. 25-26) on *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952), for the proposition that the corporate veil here should be pierced is wholly misplaced. That case involved the vesting of assets in which nonenemy aliens and American citizens had an interest. As pointed out by both courts below (Pet. App. A25 n.15, C28-C29), there has been no such vesting of the Dong Phuong Bank's American-based assets that might permanently deprive the shareholders of their ability to recover compensation for their interest in the firm. Thus, the principle of *Kaufman* has no bearing here.

the legitimacy of such actions in *Dames & Moore* v. *Regan*, *supra*.

Moreover, petitioner failed to establish the extent of his interest in the assets involved here. There was, for example, no proof that there would be any net assets left after payment of the Bank's depositors and other creditors. Indeed, there is not even any reliable proof, much less a determination, that there was an uncompensated expropriation. The most recent radio broadcast referred to by petitioner, to the extent that it and the others are reliable, indicated that the Vietnamese banks, including the Dong Phuong, were to pay their depositors and collect debts, and that there was to be some accounting with the banks' shareholders (C.A. App. 200).[12]

5. Petitioner's claim that his property has been taken without just compensation need not delay this Court. The assets are temporarily blocked; they have not been taken from the Bank and disposed of. Under the same or similar regulations, Chinese assets were blocked for 30 years before being released under a settlement between the respective Governments, and Cuban assets have now been blocked for some 20 years. Petitioner's contention that a taking is effected by the blocking or freezing of assets under such circumstances—in order to permit a diplomatic solution to the complex questions of competing claims, but

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[12] Because the Secretary's decision declining to grant an unblocking license at this time merely preserves the status quo and does not give extraterritorial effect to an expropriation decree of a foreign sovereign, petitioner's assertion (Pet. 31, 39-40, 47) that the decision below conflicts with the Fifth Circuit's decision in *Maltina Corp.* v. *Cawy Bottling Corp.*, 462 F.2d 1021, cert. denied, 409 U.S. 1060 (1972), regarding such extraterritorial effect is without merit.

without a vesting of title to the property in the United States or any other person—would impose a substantial obstacle to the ability of the United States to engage in the very claims settlement process that this Court only recently sustained in *Dames & Moore* v. *Regan*. For this reason, the federal courts that have considered a taking claim in this setting have rejected it. *Cheng Yih-Chun* v. *Federal Reserve Board of New York*, 442 F.2d 460, 465 (2d Cir. 1971); *Nielsen* v. *Secretary of Treasury*, *supra*, 424 F.2d at 843-844. Even assuming that a temporary freeze might at some point attain a sufficient duration to ripen into a taking, the length of the freeze of Vietnamese assets in this case surely cannot be thought to have attained that duration, in light of the far longer freezing of Cuban and Chinese assets, cited above.[13]

We do not dispute, of course, that "friendly aliens [have] the right to just compensation for the requisitioning of their property by the United States." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479-480 (1947); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931). The freezing of the Bank's assets pending an accounting and settlement has not, however, worked such a requisitioning. Cf. *United States* v. *Caltex, Inc.*, 344 U.S. 149 (1952).

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[13] The Court considered it premature to decide whether the suspension of claims involved in *Dames & Moore* constituted a taking, and merely left the petitioner there free to assert such a claim under the Tucker Act. *Dames & Moore* v. *Regan*, *supra*, 453 U.S. at 688-689. Petitioner Than already has filed such an action in the Court of Claims (now the United States Claims Court), which has been stayed pending final action in this case. *Tran Qui Than* v. *United States*, Civ. No. 287-81C (filed Apr. 29, 1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 81-2219

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

TRAN QUI THAN, PETITIONER,

v.

DONALD T. REGAN,
SECRETARY OF THE TREASURY

PETITIONER'S REPLY BRIEF

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TRAN QUI THAN, PETITIONER

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DONALD T. REGAN
SECRETARY OF THE TREASURER

PETITIONER'S REPLY BRIEF

This reply brief addresses several arguments first raised in respondent's brief in opposition ("Br. Op.").

1. The record belies respondent's repeated assertion that his case is "largely fact-bound" (Br. Op. 10, 14).

There was no dispute below as to the material facts, and the petitioner does not challenge any factual determinations here. It was uncontested that when the

Communist forces overran South Vietnam, the Dong Phuong Bank in Saigon, a private Bank, had assets in the United States consisting of a debt owed to the Bank by the U.S. Army. The Bank was confiscated by the Communists, but the debt escaped the confiscators' reach. Petitioner and most of his fellow shareholder-directors escaped from Vietnam and are now either in this country or elsewhere in the Free World. Petitioner seeks to recover the Bank's American-based assets and challenges respondent's withholding of the assets for potential use as a "bargaining chip" in future negotiations with the Vietnamese Communists.

Petitioner relied below in part on the resolution issued in Saigon on April 15, 1975, by the shareholder-directors

authorizing them, inter alia, to "manage and make use of . . . properties that the Dong Phuong Bank possesses abroad." (Pet. 12; Pet. App. A4 n.2). The respondent's predecessor ruled that this resolution was ineffective to dissolve the corporation or to transfer its assests to the shareholder-directors (Pet. App.D3-D4), and the courts below upheld this determination (Pet. App. A21-A23). Respondent now urges that this factual determination is dispositive of petitioner's claim. We disagree.

We submit that under the chaotic conditions under which the shareholder resolution was passed, it is legally of no moment whether the resolution formally dissolved the Bank, and whether it transferred the Bank's assets to the shareholder-directors. The governing

principle of law was settled in this country in the 1920's when Soviet confiscations and destruction of Russian corporations having assets in the United States came before the courts. The genius of the common law developed the principle that where a legal entity established under foreign law has assets in this country, and the entity is confiscated and destroyed at the place of its incorporation, the entity continues its legal existence in this country for purposes of protecting its American-based assets; furthermore, the former directors of the entity continue to be authorized to represent the entity and to recover its American-based assets. Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 263 N.Y. 263, 170 N.E. 479, 485-486 (1930), cert. denied,

282 U.S. 878 (1930); James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 363, 367 (1928).

That principle, we submit, is for application here. Respondent fails to address our legal submission, and disposes of the authorities with silence.

2. We take strong exception to respondent's attempt to interject a new factual issue in this Court. In an effort to question petitioner's right to recover the Dong Phuong Bank's American-based assets, respondent speculates that there may be creditors who may have claims to the Bank's assets. He suggests that "it is not unreasonable to assume that the Bank had substantial creditors in Vietnam and perhaps elsewhere. . . . Finally, even as to the particular payment due to the Bank under the Army

contract in this case, petitioner failed to establish what amount, if any, was due to the Bank." (Br. Op. 19, n. 10) 1/

No such contention was raised--or could have been raised--by the respondent at the administrative level or in the courts below. The debt owed to the Dong Phuong Bank by the U.S. Army was conceded. (Pet. 10). There is nothing in the freezing regulations administered by the respondent authorizing him to investigate whether a person seeking the return of frozen property has any creditors, nor has the respondent been charged with the task of administering a

1/ Elsewhere, respondent goes farther and asserts that "petitioner failed to establish the extent of his interest in the assets involved here. There was, for example, no proof that there would be any net assets left after payment of the Bank's depositors and other creditors." (Br. Op. 21).

bankruptcy or liquidation program on behalf of creditors in Vietnam or elsewhere. The identical contention which is now being voiced by the respondent was summarily rejected over half a century ago by (then) Judge Cardozo in the Petrogradsky case, supra, when a New York bank resisted turning over American-based assets of a Russian bank confiscated by the Soviets to refugee-directors:

> The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. Defendant is not required to follow the money into their hands to see how they apply it. Its duty is to pay. [170 N.E. at 486.]

3. Respondent urges that this Court's recent decision in Dames & Moore v. Regan, 453 U.S. 654 (1981) is somehow

dispositive of the question raised in the petition (Br. Op. 10-12). He contends that petitioner has not advanced any reason for this Court to examine the principles reviewed in Dames & Moore "as applied to corporately owned Vietnamese assets in this country." (Br. Op. 12).

We would have sought that this Court made it clear beyond peradventure that its decision in Dames & Moore was of the narrowest compass (453 U.S., at 686-688). The property involved there, which the President himself had frozen following an explicit declaration of a national emergency vis-a-vis Iran, consisted of "property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the

United States . . ." (Emphasis added; 453 U.S., at 663-664). 2/ The Dames & Moore Court held that in settling a major foreign policy dispute between the United States and Iran, the President was empowered to suspend claims pending against Iran in U.S. courts; to unfreeze Iranian governmental assets; and to require claimants to assert their claims in an alternate forum established by agreement with Iran.

2/ In contrast, here there was no Presidential declaration of a national emergency vis-a-vis Vietnam. The freezing of Vietnamese property in this country was justified by the national emergency proclaimed by President Truman on December 16, 1950 as a result of the Korean conflict. 64 Stat. A454. The freeze was not imposed by the President, but by a low-level official in the Department of the Treasury, the "Acting Director, Office of Foreign Assets Control." 40 Fed. Reg. 19202 (May 2, 1975).

We do not question the Executive's right to freeze property of a foreign state which becomes the target of economic sanctions imposed by the Executive in times of a declared emergency, and to use such government-owned property for settlement purposes. Nor do we question the Executive's right to freeze property belonging to residents of a state against which economic sanctions are imposed, so as to deny to such state or its residents access to U.S. currency. (Pet. 28). This case, however, deals exclusively with privately-owned property in the United States, claimed by refugees outside of the state which is the target of the Executive's sanctions. Petitioner is being indefinitely denied the benefit and use of his private property solely on the

ground that the Executive may wish to use the property as a "bargaining chip" in future negotiations with the Communists in Vietnam. Nothing that this Court decided or stated in Dames & Moore is dispositive of petitioner's claim here.

4. Kaufman v. Societe Internationale, 343 U.S. 156 (1952), teaches that where corporate assets are seized under the authority of the Trading with the Enemy Act, the plight of innocent stockholders must be considered before the corporate assets can be appropriated for a public use. (Pet. 25-26). Respondent dismisses Kaufman with the trite observation that that case "involved the vesting of assets in which non-enemy aliens and American citizens had an interest . . . . [T]here has been no such vesting of the Dong Phuong Bank's

American-based assets that might permanently deprive the shareholders of their ability to recover compensation for their interest in the firm" (Br. Op. 20, n. 11; see also id., at 21-22). To distance himself from Kaufman, respondent repeats by rote that petitioner's property here has been only "temporarily blocked" (Br. Op. 20, 21, 22), and he suggests that the 7-1/2 year blocking of petitioner's property is not unduly burdensome when measured against the 30-year blocking of Chinese assets and the 20-year blocking of Cuban assets (Br. Op. 21-22).

The duration of the blocking, we submit, is of no constitutional relevance. If, as we maintain (Pet. 26-27), an alien friend's property in this country enjoys the same constitutional

protections as property belonging to citizens, the alien's property may not be requisitioned for a public use in total disregard of the mandates of the Fifth Amendment.

We respectfully urge that this Court review the legality of the Executive's use of private property belonging to an alien friend as a "bargaining chip" in the furtherance of the foreign policy interests of the United States.

Respectfully submitted,

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